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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 183

THE ASSOCIATED PRESS,

Petitioner,

v.

TAFT-INGALLS CORPORATION, formerly known as The Cincinnati Times-Star Company, an Ohio corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDICES

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May 26, 1965

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Associated Press, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered January 18, 1965. The judgment sought to be reviewed reversed the judgment of the United States District Court for the Southern District of Ohio, Western Division, which awarded damages to petitioner against respondent, and remanded the case with instructions to dismiss the complaint.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 340 F. 2d 753. The opinion of the United States District Court is unreported. The opinions of the Court of Appeals and the District Court are annexed hereto as Appendix A and Appendix B, respectively (*infra*, pages 1a, 60a).

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered on January 18, 1965. The judgment is annexed hereto as Appendix C (*infra*, page 70a). Petitioner's timely petition for rehearing en banc was denied on February 25, 1965, and its timely petition for rehearing was denied on February 27, 1965. The orders denying rehearing en banc, and rehearing, are annexed hereto as Appendix D and Appendix E, respectively (*infra*, pages 72a, 73a). On application of respondent, Mr. Justice Stewart, on April 7, 1965, ordered that the time for filing a petition for writ of certiorari in this case be extended to and including May 28, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. May the Cincinnati Times-Star ("Times-Star"), a newspaper-member of The Associated Press ("AP"), which desired and voluntarily entered into a contract with AP for a leased wire news service, which was transmitted over three wires, and which continued to receive this service without protest for nine years, thereafter defend an action for breach of such contract on the ground that the contract constituted an illegal tie-in arrangement in violation of the antitrust laws?

2. Where AP furnishes its basic news service to its metropolitan newspaper members over three wires, three wires being required by metropolitan newspapers because of the increased volume of news, where each of the wires when necessary or convenient is used interchangeably with the others, and where costs of news gathering and its dis-

semination are not allocable among the three wires on any realistic basis, does an assessment of AP members for this service as a unit constitute an illegal tie-in violating the antitrust laws?

3. Was the finding of the District Court that there was insufficient evidence upon which to find that the news transmitted over one particular facility was a separate and distinct service from the news transmitted over another facility clearly erroneous so as to permit the Court of Appeals not only to set the finding aside but to make its own contrary finding of fact?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended 50 Stat. 693, 69 Stat. 282; 15 U. S. C., Sections 1 and 2; and Sections 3 and 4 of the Clayton Act, 38 Stat. 731; 15 U. S. C., Sections 14 and 15. The texts of these statutes are set out as Appendix F (*infra*, pages 74a-76a).

STATEMENT OF THE CASE

AP is a mutual, co-operative membership corporation organized in New York in 1900 to gather with economy and efficiency an accurate and impartial report of the news. The purposes for which AP was organized are to gather, by its own instrumentalities, by exchange with its members and by other appropriate means, all kinds of information for the use and benefit of its members, consisting of approximately 1,750 newspapers, and approximately 2,200 radio and television stations (R. 61a; P. Ex. 6, R. 395a-397a).*

*The citation "R a" refers to pages in the Appendix for Defendant-Appellant (Respondent) in the Court of Appeals (Volume III of the Certified Record); the citation "R b" refers to pages in the Appendix for Plaintiff-Appellee (Petitioner) in the Court of Appeals (Volume IV of the Certified Record).

Times-Star became a charter member of AP when the latter was founded (R. 421a). It continued as a member until 1958, when it sold its principal assets to another Cincinnati publisher (P. Ex. 7, R. 424a). In August 1948 it entered into a contract with AP for AP's news service and, among other things, agreed that the contract should continue until termination upon two years' notice (P. Ex. 4, R. 390a-393a).

When, in July 1958, without giving the requisite notice, Times-Star purported to terminate the agreement, AP filed its Complaint on September 15, 1958, against Times-Star for breach of contract, and its Amended Complaint on January 29, 1959 (R. 5a, 12a). Jurisdiction of the District Court was invoked on grounds of diversity of citizenship, the amount in controversy exceeding $10,000. Times-Star's Second Amended Answer and Counterclaim alleged, among other things, that the contract was invalid for the reason that it embodied a tying agreement illegal under 15 U. S. C., Sections 1, 2 and 14 (R. 15a, 16a-17a).

Prior to 1900, newspapers in the United States did not have adequate access to national and international news. No single newspaper had resources or facilities to gather such news in sufficient quantities to publish a complete newspaper (D. Ex. 57-B, R. 548a). To satisfy this need petitioner, AP, was formed as a non-profit membership corporation in 1900 by newspaper proprietors, including a representative of Times-Star (P. Ex. 6, R. 393a-396a, 398a-399a; P. Ex. 7, R. 421a). Each member is obligated to furnish news within its area to AP and AP acts as a medium for the exchange of such news among its members. In addition, AP, through its own instrumentalities, gathers news for its members (P. Ex. 4, R. 390a; P. Ex. 6, R. 395a-397a).

Prior to 1935, the volume of news collected and transmitted by AP to its metropolitan member-newspapers was

such that it could be sent over facilities which came to be known as the A and B wires* (R. 161a-162a). The A circuit connected directly with metropolitan member-newspapers throughout the United States. The B wire, which carried news beyond the capacity of the A wire to handle promptly, connected the approximately 100 news bureaus of the AP in the United States. These bureaus, in turn, were able to forward news coming over the B wire to member-newspapers on a regional or local wire which became known in Ohio as the S wire or the Ohio Big Cities wire (R. 153a, 161a, 180a-183a, 185a, 79b-81b).

By 1935 the volume of news had increased to such an extent that an additional transmission facility, known as the D wire, was added with the consent of all members, including Times-Star, and was used principally for the transmission of business and financial news (R. 161a-162a; P. Ex. 7, R. 422a). Commencing about 1935, therefore, the basic service of AP provided for transmission of news to the Times-Star and other metropolitan newspapers east of Kansas City and north of the Mason-Dixon line by way of the A, D and regional or S circuits (R. 81a-82a, 214a, 215a).

These additional wires were not added so as to permit a segregation of types of news. They were added because the growing volume of news could not be handled by one circuit (R. 161a-162a). Plainly, they were not added to enable AP to tie one service to another, for its members had theretofore been receiving the same news over a single wire. If the capacity of a single circuit could be sufficiently en-

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*The term "wire" in relation to AP's news service came into usage in the early years when messages were transmitted over telegraph wires (R. 164a). Today, the "wire" is not an actual physical wire but an electronic channel or wireless beam (R. 181a, 80b).

larged, AP could, and perhaps would, return to a one circuit operation.

Subsequent to 1935, news transmitted to the Times-Star and other metropolitan newspapers over the A circuit was principally general and of common interest and importance to the members (P. Ex. 7, R. 421a-422a; R. 179a). News transmitted over the D circuit was principally of a business and financial character, and news transmitted over the S or Ohio Big Cities circuit was principally of a local or regional character (P. Ex. 7, R. 422a). However, the use of a particular wire or circuit did not determine the character of the news. News of any kind was transmitted over any available circuit when circumstances warranted.

For example, the D wire is used for general news when the A wire cannot at the moment accommodate such news (R. 180a, 186a, 261a-262a, 79b, 99b, 108b, 110b-111b, 135b). Important financial news is carried by the A wire, for instance, the story of a stock split by AT&T (R. 187a, 261a, 343a-344a, 98b-99b). The S wire is used not only for news originating in Ohio, but for news originating elsewhere (R. 180a, 185a, 99b-100b, 79b-80b, 135b). Thus news coming over the B wire to AP's Columbus bureau is shifted to the S wire for further transmission to Cincinnati and other Ohio metropolitan cities (R. 180a-183a, 79b-80b). Sunday features are sent over any available wire (R. 110b).

News originating in Ohio might go over the S or A wire, or sometimes both (R. 100b-101b, 185a-186a). The Sheppard trial in Cleveland, for example, was carried to members over the A wire (R. 100b-101b). A presidential speech in Cleveland would undoubtedly be carried on the A wire and, in condensed form, on the S wire (R. 100b-101b). Stories from abroad are transmitted at various times over the A, D and S wires (R. 135b). In summary, which news is to be transmitted over which facilities is determined from

hour to hour by the volume and importance of the news moving at a particular time.

The testimony concerning a presidential speech in Cleveland demonstrates not only the interchangeable character of news wires, but also shows that news in general cannot be labeled as "national" or "regional" or "local". The same news can, and often does, partake of all three characteristics.

Relevant to the question of whether the three circuits constitute a single, indivisible service is the method by which AP's newspaper members are charged for the service, and the problem of whether costs could be fairly allocated among the three wires. Since its inception, AP has financed the cost of its operations by assessments upon member-newspapers. Assessments are calculated on the basis of the population served by each newspaper (R. 65a-66a, 195a, 89b; 118b; D. Ex. 35, R. 467a-468a). Times-Star retained as an expert Mr. R. Kirk Batzer, of the accounting firm of Lybrand, Ross Bros. & Montgomery. Mr. Batzer probed the assessment formula in detail and conceded that it was a fair method of assessment (R. 339a). Although Mr. Batzer was retained to devise a formula to break down assessment costs as to each of the three wire services, his report stated that ". . . . we feel that neither the charges or so-called elements themselves which make up the basic assessment nor any particular analysis thereof can be used to determine the separate wire cost" (D. Ex. 54, R. 526a-527a; R. 342a-343a).

An example taken from Judge O'Sullivan's dissenting opinion well illustrates not only the cost problem involved but also the inseparable character of news. As Judge O'Sullivan stated (*infra,* pages 37a-38a):

> "AP's man in Cairo, Egypt gets information that a prominent Cincinnatian is killed in Cairo, together

> with other Cairo news of worldwide interest; he sends this bundle of news to the AP bureau in New York, and from there it goes to the AP bureau at Columbus on the B wire; the chief there picks off the item of the death of the Cincinnatian and sends it to Cincinnati on the Ohio wire. I pose the question, when does this news become a separate and distinct commodity? At Cairo, Egypt? Or was it converted to singularity at Columbus, Ohio? If so, should a charge for the service be limited to some portion of the salary of the AP man at Columbus and the cost of the electronic channel between Columbus and Cincinnati? But who then is to pay for the services of the people who gathered and sent out the news from Cairo, and who is to pay for its handling in New York and how will these costs be apportioned? How will Cincinnati be separately assessed for a part of Cairo's costs for the rare day on which an event in Egypt has some special interest in Cincinnati?"

None of the four judges below who heard the case appeared to believe that Times-Star had shown any fair basis for allocating costs among the various wires. Judges Phillips and Edwards, constituting a majority in the Court of Appeals, said, however, that Times-Star's tie-in defense should not be nullified by unavailability of cost records (*infra,* pages 24a-25a). Judge O'Sullivan, on the other hand, in his dissenting opinion in the Court of Appeals, took the view that inability fairly to apportion costs goes to the heart of the separability issue (*infra,* page 44a; see also, District Court Opinion, *infra,* pages 66a-67a). An attempt to charge separately for a segment of AP's basic news service transmitted over the A, D and S facilities could result in serious inequities among its members (R. 343a-344a, 21b-23b).

Since AP is a membership corporation, there is no seller seeking, in an arm's length transaction, to compel an unwilling buyer to purchase unwanted merchandise. The seller is not a stranger to the user but the creature of the user. Under the By-laws, the regular members, of which Times-Star was one, are vested with power to elect the directors of AP and to recommend or ratify any amendment of the By-laws (P. Ex. 6, R. 404a-406a, 417a). If the members want news transmitted or paid for in a different manner, they have the power to accomplish their purpose.

For many years prior to August 1948, Times-Star had been receiving AP's basic news service, transmitted over the A, D and S wires (R. 162a-163a, 27b). On August 4, 1948, Times-Star and AP entered into the standard membership contract upon which this suit was brought by petitioner. Under the contract, AP agreed to furnish to Times-Star its "leased wire news service" (consisting of the same basic news service, transmitted over the A, D and S wires, which Times-Star had previously received), and Times-Star agreed to pay its assessment as fixed from time to time by AP's Board of Directors. The parties also agreed that the contract should continue until terminated by Times-Star upon two years' notice. Under the contract, if Times-Star transferred its business, the two-year notice requirement would become effective unless Times-Star caused its successor to agree to fulfill the contract and apply for membership in AP (P. Ex. 4, R. 390a-392a; R. 27b).

There is not even a suggestion in the record below that Times-Star, when it executed the August 1948 contract, requested anything less than the basic news service which, for years, had been furnished to it and similarly situated metropolitan newspaper-members. There is no evidence that Times-Star at that time inquired whether a lesser

service could be supplied. Indeed, this was conceded at the trial. When the District Court commented that ". . . there was absolutely no evidence whatever that there was—that it [the contract] was entered into under a complaint", Times-Star's counsel replied, "We don't have to show that, I want that understood, that is basic" (R. 112b).

During the interim between August 1948 and September 1957, Times-Star's conduct unequivocally confirmed its counsel's concession that the August 1948 contract was entered into without protest and that, indeed, Times-Star received under the contract exactly what it wanted. For example, David S. Ingalls, who became President and Publisher of Times-Star in 1954, testified that it was then the judgment of management that Times-Star needed the AP services (R. 42b, 113a). Neither he nor Rosemond, Times-Star's assistant publisher, considered requesting AP to reduce its assessment or in the alternative its basic service until 1957 (R. 111a, 278a, 110b-111b). In fact, Times-Star's first letter on the subject to AP, in August 1957, did not seek a lesser service but merely inquired whether its assessment could be reduced (D. Ex. 13, R. 451a).

When, in September 1957, nine years after the contract had been entered into, Times-Star for the first time inquired whether it would be possible for AP to deliver only the S wire, AP replied in the negative (R. 280a-281a, 286a). Even then, Times-Star did not request AP to discontinue its basic service, or give notice that it intended to do so (R. 286a). Nor did Times-Star ask AP's Board of Directors to consider a change in the basic assessment for members. Rather, it continued to accept the service and pay for it until July 26, 1958. At about that time, without any prior notice, it purported to cancel the August 1948 agreement (R. 64a, 110a, 286a; P. Ex. 5, R. 393a; P. Ex. 7, R. 424a).

As of July 19, 1958, publication of Times-Star had been discontinued and the paper had been sold to the owner of its afternoon competitor, E. W. Scripps Company, publisher of The Cincinnati Post (P. Ex. 5, R. 393a; P. Ex. 7, R. 424a), and an affiliate of United Press International (R. 255a).

AP thereafter brought this action to recover the amount of Times-Star's assessment for the two year period for which it was obligated under the contract. Times-Star's primary defense was that the contract was unenforceable because AP's refusal in 1957 to furnish only one of the three transmission facilities constituting its basic service amounted to a tie-in illegal under the Sherman Act sufficient to invalidate the 1948 contract.

The District Court (Hon. Frank J. Battisti), finding that Times-Star had failed to prove an illegal tie-in, rendered judgment in favor of AP in the sum of $158,703.43, with interest from July 26, 1958 (*infra,* page 69a). The Court of Appeals, finding, erroneously we submit, an illegal tie-in between the parties to the action, reversed the District Court's judgment in awarding damages to AP, but affirmed the action of the District Court in dismissing Times-Star's antitrust counterclaim, on the ground that the evidence of damages was too speculative to support a recovery (*infra,* page 34a).

Judge O'Sullivan, who dissented in the Court of Appeals, stated, among other things, that "I find it difficult to understand how a contract without taint when made can be converted to complete illegality during its term by a request for total or partial release from its valid obligations", that ". . . the intricacies and complexities involved may make it impossible to offer any evidence for reliably dividing into separate and distinct products or articles the incorporeal thing called news", and that ". . . the obvious

difficulty and perhaps impossibility of making any such cost division that would be reliable is, I believe, relevant to and supportive of the District Judge's finding of fact that appellant [Times-Star] failed to prove its case of separability and distinctness" (*infra,* pages 51a, 44a).

The majority of the Court of Appeals appears to have relied to a large extent on four circumstances in finding that the Ohio Big Cities wire was separable from the A and D wires.

One circumstance was AP's treatment of a so-called Kentucky wire. After Times-Star was sold to the Scripps Cincinnati paper, Scripps inquired whether its paper could subscribe to only the A wire. AP replied that the basic service included the A, D and S circuits and that they were not severable. However, it advised Scripps that the Kentucky service could be eliminated at a reduction of $240.60 weekly (D. Ex. 41, R. 497a).

This circumstance lends no support to the Court of Appeals which inferred therefrom that if the Kentucky wire was severable, the S wire should also be severable (*infra,* pages 18a-19a). In drawing the inference, the Court of Appeals ignored the fact that Times-Star had held a second AP membership in the name of The Kentucky Times-Star, a Covington, Kentucky, newspaper, and in August 1948 had signed a separate contract for the Kentucky service for its Kentucky newspaper (P. Ex. 15, R. 169b; P. Ex. 4, R. 390a-392a; P. Ex. 17, R. 171b-173b; R. 111a, 288a, 155b; *infra,* pages 46a-47a). Thus the Times-Star had two memberships and two contracts with AP. One was for the Times-Star, Cincinnati, the other was for the Kentucky Times-Star. In 1956 AP had advised Times-Star that it could not cancel the Kentucky wire without violating its contract (D. Ex. 45-B, R. 510a). However, in 1958, after the change of ownership, the Scripps Cin-

cinnati paper in response to its inquiry was told, in effect, that it need not subscribe to two memberships if it did not so desire.

Plainly, Times-Star had not been paying the $240.60 as a price for the Kentucky wire based on any costs severed from the assessment it paid as a Cincinnati newspaper for the basic A, D and S news service. Rather, it had paid the money as a second proportionate assessment based on population for the leased wire news service supplied to it for its Covington newspaper and to similarly situated Kentucky newspapers (P. Ex. 17, R. 171b-173b; D. Ex. 35, R. 475a, 488a, R. 111a, 288a).

A second circumstance relied on by the Court of Appeals majority was the fact that AP offered its sports service separately, at a separate charge (*infra*, page 19a). From this the majority inferred that the S wire was also severable. But Times-Star entered nothing in the record to meet its burden of establishing that the sports wire and the S wire were comparable, and that AP did not maintain a special staff of reporters whose sole duty was to cover sports events, so that a separate and fair cost for the sports service was relatively simple to establish. With respect to the basic A, D and S wire service, on the other hand, newsmen must be posted throughout the world, ready to gather spontaneous news of any character, whether of national, regional or local interest. A realistic allocation of costs among those wires would be impossible.

A third circumstance deemed significant by the majority was its observation that although A and D wire news spilled over on the S wire, there was no evidence that Ohio regional news spilled over on the A and D wires (*infra*, page 20a). Even if significant, which is most doubtful, the observation is contrary to testimony of both AP and Times-Star personnel (R. 185a-186a, 100b-101b, 103b).

Fourth, the majority inferred that since UPI charges separately for its news services, AP could do the same (*infra*, page 22a). As Judge O'Sullivan, dissenting, pointed out, the evidence on this subject is quite unclear (*infra*, page 38a). In any event, there is no similarity between UPI, a profit making corporation, which, if it so desired, could charge separately for separate wire services whether or not each charge is based on a fair allocation of costs among its facilities, and AP, a non-profit membership corporation, whose interest is not to make a profit, but to treat all its members fairly and without discrimination. AP cannot permit one of its members to pay less than a proportionate assessment for a segment of its basic service, when the result would be to shoulder its remaining members with a higher and disproportionate assessment.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict with the Decisions of This Court in *United States* v. *Paramount Pictures*, 334 U. S. 131, and *Automatic Radio Co.* v. *Hazeltine*, 339 U. S. 827, and with the Decision of the Court of Appeals for the Tenth Circuit in *McCullough Tool Company* v. *Well Surveys, Inc.*, 343 F. 2d 381 (1965), and Probably Is in Conflict with the Decision of This Court in *United States* v. *Loew's Inc.*, 371 U. S. 38.

So far as we know, it has never been held, except by the Court of Appeals below, that an illegal tie-in can exist between a seller and a buyer where the latter, at the time he executed the contract, wanted precisely the package of products which he bought. On the contrary, illegal tie-ins, by definition, assume that a seller, using the economic power inherent in the demand for one of its products, requires as

a condition to the purchase of such product that the buyer also purchase a second distinct product which the buyer does not want.

Thus, in *United States* v. *Paramount Pictures,* 334 U. S. 131, this Court held that motion picture distributors' practice of offering for license one feature picture on condition that the exhibitor will also license another feature was an illegal tie-in. Mr. Justice Douglas, however, speaking for the Court, was careful to point out that the Court did not suggest that films may not be sold in blocks or groups, and to add, "All we hold to be illegal is a *refusal** to license one or more copyrights unless another copyright is accepted" (at p. 159).

In *Automatic Radio Co.* v. *Hazeltine,* 339 U. S. 827, this Court, in deciding that Hazeltine's patent licensing practices did not involve an illegal tie-in, pointed out that there was nothing in the record to support the averment that ". . . Hazeltine *refused** to grant a license under any one or more of its patents to anyone who *refused** to take a license under all" (at p. 831).

In *McCullough Tool Company* v. *Well Surveys, Inc.,* 10 Cir., 343 F. 2d 381 (1965); it was charged that Well Surveys misused its patents by conditioning its licensing agreements upon the aeceptance of a license under all of its patents in violation of the "package" or "block-booking" rules. The Court of Appeals for the Tenth Circuit, in holding that there was no patent misuse on this ground, stated (p. 408):

> "However, in order to constitute a misuse, there must be an element of coercion, such as where there has been a *request** by a prospective licensee for a license under less than all of the patents and a *refusal** by the licensor to grant such a license. Auto-

*Emphasis supplied.

matic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U. S. 827, 70 S. Ct. 894, 94 L. Ed. 1312."

In *United States* v. *Loew's, Incorporated,* S. D. N. Y., 189 F. Supp. 373, 380-1, 394 (1960), *aff'd on merits, remanded for further consideration of decree,* 371 U. S. 38, it was held that motion picture distributors' practice of compelling television stations, desiring particular feature films, to buy blocks of these films, was an illegal tie-in arrangement. Judge Dawson, however, in answer to a Government contention that contracts executed by a defendant film distributor with Storer Television Stations were block-booked, observed (p. 394):

> "Mr. Storer testified that he had never *requested** splitting or making substitutions in the 'Big 50' [block of films] in any market. Clearly none of the contracts was individually block booked."

Judge Dawson's ruling, so far as Storer was concerned, apparently was not the subject of review by this Court. However, this Court, after finding ample other evidence of illegal block-booking, went on to discuss the nature of the decree. It held that the Government properly requested a modification of the decree so as to require the defendants initially to price the films individually and to offer them on a picture-by-picture basis. As Mr. Justice Goldberg said, this was a necessary addition to the decree "in view of the evidence appearing in the record" (p. 53). In other words, there is nothing wrong with offering to sell in a package, in the absence of a request for less. However, where the record shows, in a Government suit, ample evidence of illegal tie-ins, the Government is entitled to effective relief and, as this Court stated, ". . . otherwise permis-

*Emphasis supplied.

sible practices connected with the acts found to be illegal must sometimes be enjoined" (p. 53).

Plainly, therefore, an illegal tie-in cannot exist as between a willing buyer and a willing seller. We know of no authority, other than the decision of the Court of Appeals below, permitting a party to a contract, voluntarily entered into on its part, to escape the consequences of its breach because later, and before the contract was validly terminated, it changed its mind and decided that it no longer wanted to pay for what it had voluntarily agreed to take. There is no evidence that Times-Star at the time it entered into the August 1948 contract requested or desired a lesser service. Indeed, respondent's counsel insisted that Times-Star did not have to show that it made any complaint or protest at the time it entered into the contract (R. 112b). Moreover, as we have shown, respondent's conduct for nine years after entering into the 1948 contract demonstrated that it wanted exactly what it had agreed to take (*supra*, page 10).

The decision of the Court of Appeals below, therefore, is directly contrary to the decisions of this Court and of the Court of Appeals for the Tenth Circuit.

2. The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict with the Decision of This Court in *Kelly* v. *Kosuga*, 358 U. S. 516.

The decision below is erroneous even if it be assumed *arguendo* that AP's policy or practice requires metropolitan members to subscribe to a basic service consisting of not less than three wires, and that such a practice would be illegal.* To hold, as did the Court of Appeals below, that

*The fact is, however, that Starzel, AP's General Manager and chief operating executive since 1948, could recall no instance where any other newspaper raised a question about receiving less than the basic three-wire service (R. 60a, 163a).

a willing buyer may take advantage of such assumed illegality so as to escape the consequences of his breach, years later, of a contract valid as between the parties is directly contrary to the decision of this Court in *Kelly* v. *Kosuga*, 358 U. S. 516. In so holding, the Court of Appeals has approved an antitrust defense which, at best, must be described as highly questionable, and has disregarded the admonition of Mr. Justice Brennan in *Kelly* v. *Kosuga*, *supra*, that "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court" (at p. 518).

The petitioner in *Kelly* had refused to accept and pay for all the onions he had contracted to buy from respondent. In defending an action for the unpaid part of the purchase price,* petitioner claimed that plaintiff-respondent had informed petitioner and other onion growers that unless they purchased a large amount of onions from respondent, the latter would deliver them on the futures exchange to depress the cash market price of onions. Petitioner further alleged that as part of his agreement to purchase onions, respondent, petitioner and other onion growers agreed that they would not deliver onions on the futures market.

Even though this Court assumed that these allegations charged a Sherman Act violation, it permitted recovery on the contract. Speaking for the Court, Mr. Justice Brennan stated (p. 521):

> "Accordingly, while the nondelivery agreement between the parties [to withhold onions from the futures market] could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation

*Contrary to the Court of Appeals' implication (*infra*, pages 33a-34a), the action in *Kelly* was for the balance of the contract price for onions not received or used by the defendant (358 U. S. at p. 518). See also *Kosuga* v. *Kelly*, 7 Cir., 257 F. 2d 48, 50 (1958), *aff'd*, 358 U. S. 516.

> of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of 'divisibility' or some other verbal formula may well be circular, see 6 Corbin, Contracts, § 1520, in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question."

As in *Kelly,* there is no inherent vice here in Times-Star's contract to take AP's basic service and to pay a fair assessment. This contract equally "constitutes an intelligible economic transaction in itself. . . ." This is true even though it be assumed, as in *Kelly,* that there was an illegal tie-in.

Indeed, any assumed illegality in the instant case is far more remote from the contract sued upon than the assumed illegality in *Kelly.* Since, in *Kelly,* the total arrangement between the parties was assumed to be illegal in part, this Court was required to rule that the illegal portion of the arrangement could be disregarded when the part sought to be enforced was of itself an intelligible economic transaction. Here, as we have shown, no part of the 1948 agreement between the parties can in any sense be deemed illegal. Thus this Court need not consider whether it should sever an illegal portion of a total transaction from a legal portion. It need merely recognize, we respectfully suggest, that the assumed existence of an illegal tie-in policy does not taint or in any way affect the arrangement between AP and Times-Star, where a willing buyer agreed with a willing seller to purchase exactly what was offered. If the antitrust defense was of no avail in *Kelly,* where the illegality was part of the total agreement, *a fortiori,* it is of no avail to Times-Star.

3. The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict with the Decision of This Court in *Times-Picayune* v. *United States*, 345 U. S. 594, and the Decision of the United States Court of Appeals for the First Circuit in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1961), *cert. den.*, 368 U. S. 931.

In *Times-Picayune* v. *United States*, 345 U. S. 594, a publisher owned both a morning newspaper, the Times-Picayune, and an evening newspaper, the States. Its policy required classified and general display advertisers to purchase combined insertions appearing in both the morning and evening papers. One of the grounds for holding that an illegal tie-in did not exist was stated by the Court in the following terms (p. 614):

> "The factual departure from the 'tying' cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the *forced** purchase of a *second distinct commodity** with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same."

So here, member-newspapers buy news from AP to obtain the fullest possible coverage—to prevent being

*Emphasis supplied.

"scooped". Times-Star, in 1957, sought a lesser service because of its "stringent cost reduction program" (D. Ex. 13, R. 451a). But for that, we submit, Times-Star's motivations would never have deviated from those expressed by its own assistant publisher, Mr. Rosemond, who testified, "We depended upon the Associated Press to get us any number of wires, whether it be three, four, five or six. We depended upon them to get the news to us as quickly as possible. If a big story is breaking and one wire is overloaded, we would depend upon them to get it to us or we might have expected to get scooped by another paper" (R. 110b-111b).

News is news, and AP's members, in paying their assessments, expect to receive promptly all spontaneous news of possible interest to their readers whether such news is sent over an A wire, a D wire or an S wire. Neither they nor AP can predict in advance what news, sent over what wire, will be of interest to newspapers readers. AP's aim, and undoubtedly that of its members, since they control AP, is to supply the members with all of the news promptly by whatever means seems most appropriate.

Indeed, the factors here, showing inseparability of the basic news service, are far more compelling than those in *Times-Picayune*. There, no practical considerations would appear to have precluded the sale of advertising space in either the morning or evening newspaper. Here, for example, furnishing Times-Star with the S wire service alone would have given it not only Ohio regional news, but considerable news gathered throughout the United States, and abroad, without adequate compensation. Since the volume and kind of news to be gathered throughout the world, which might be transmitted over the S wire, cannot be predicted, it would appear to be impossible to allocate a fair portion of AP's costs to any segment of its basic service. AP, a non-profit organization, must, in the

long run, recover its costs of operation. No more reasonable method has been suggested here than to assess its newspaper-members on the basis of population served by each member.

In *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 1 Cir., 292 F. 2d 653 (1961), *cert. den.*, 368 U. S. 931, the Court of Appeals for the First Circuit, in holding that an illegal tie-in did not exist, stated (p. 655):

> "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing. Articles, though physically distinct, may be related through circumstances. The sound business interests of the seller or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. It would not be thought, for example, that a one-legged man could insist on purchasing only a left shoe. Whatever may be meant by per se, we must first consider what may be fairly treated by a seller as inseparable."

A requirement that AP furnish one of an integral group of facilities to Times-Star would create a hardship on AP's remaining members who, because of the deficits incurred by AP, would be required to pay increased assessments were Times-Star or any other member permitted to bear less than its fair share of AP's total expense (R. 343a-344a, 21b-23b). As Judge O'Sullivan, dissenting, said, ". . . the obvious difficulty and perhaps impossibility of making any such cost division that would be reliable is, I believe, relevant to and supportive of the District Judge's finding of fact that appellant [Times-Star] failed to prove its case of separability and distinctness" (*infra*, page 44a).

In *Times-Picayune* v. *United States, supra,* Mr. Justice Clark emphasized the importance of the press to our democratic society. As he observed, "A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society" (at p. 602). The decision below will, if followed, disturb and undermine AP's fundamental relationship with about 1,250 regular newspaper-members located throughout the United States. A ruling of such importance in the sensitive area of news should be carefully scrutinized by this Court.

CONCLUSION

For the reasons advanced above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 26, 1965

APPENDIX A

Opinion of the Court of Appeals

(January 18, 1965)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

PHILLIPS, Circuit Judge.

Three principal daily newspapers were published in Cincinnati, Ohio, prior to 1958: (1) An afternoon newspaper owned by appellant, known as The Cincinnati Times-Star, (2) The Cincinnati Post, also an afternoon paper, which was a part of the Scripps-Howard system; and (3) The Cincinnati Enquirer, a morning paper. As of July 19, 1958, publication of The Times-Star was discontinued and the paper was sold to the owner of its afternoon competitor, the E. W. Scripps Company, and the combined afternoon newspaper thereafter has been published under the name of The Cincinnati Post and Times-Star.

Appellee, the Associated Press, filed a breach of contract action against appellant for failure to pay assessments for the AP's news services for two years following discontinuance of publication. Jurisdiction is based upon diversity of citizenship. The district judge, sitting without a jury, rendered judgment against appellant in favor of the Associated Press for $158,703.43, plus interest and costs, and dismissed a counterclaim. This appeal is from the judgment of the district court.[1]

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[1]Contemporaneously with the sale of its newspaper, the name of appellant, an Ohio Corporation, was changed from The Cincinnati Times-Star Company to Taft-Ingalls Corporation. Appellee sometimes will be referred to in this opinion as "The Associated Press" or "AP," the Cincinnati Times-Star as "Times-Star," the Cincinnati Post and Times-Star as "Post and Times-Star," the E. W. Scripps Company as "Scripps," the United Press as "UP," the International News Service as "INS," and United Press International as "UPI." UP and INS were merged into UPI in 1957.

Appendix A

A motion to dismiss the appeal was denied. Associated Press v. Taft-Ingalls Corporation, 323 F. 2d 114 (C. A. 6).

The Associated Press is a non-profit corporation organized in 1900 under the Membership Corporation Law of New York. It is engaged in gathering, obtaining and procuring any and all kinds of news, which it furnishes to its members for publication. The membership of AP consists of owners of newspapers and radio and television stations. There are two types of membership, regular and associate. The costs of its operations are prorated among the members under a formula of assessments adopted by the Board of Directors, acting under the authority of its By-laws.

At the time of the incorporation of AP in 1900, a representative of Times-Star applied for and was admitted to AP. membership. Times-Star subscribed to and used AP wire services as a regular member continuously from that time until discontinuance of publication 58 years later.

1) *The Contract Between The Parties*

This controversy arose out of a contract between the parties, entered into August 4, 1948, which provided that: "[I]t shall continue * * * until terminated by the Member upon two years' notice, in writing, by registered mail * * *"; and further provided that: "Upon the sale or transfer of the business of the Member to which this agreement relates, the Member shall cause the Member's successor to agree in writing to fulfill the terms and conditions of this agreement during the term thereof and to apply for membership in The Associated Press in the same class as the Member."

When appellant stopped publication of Times-Star on July 19, 1958, AP was informed by telegram of the sale

to Scripps and the following directions were given: "Accordingly please cancel all services * * * immediately under our contract with you." No back assessments were owing by appellant when publication of Times-Star ceased. The weekly assessment of appellant was paid through June 26, 1958, one week after publication of Times-Star had been discontinued. Thereafter no services were furnished by AP to appellant and no further payments were made. The only assessments at issue in this case are those for the two-year period after termination of publication and after delivery of the AP news wire services to appellant had been discontinued.

The district judge held that appellant was liable to AP for weekly assessments for its wire news service for the two succeeding years because appellant had not notified AP two years in advance of its termination of the news services,[2] and since Scripps did not become a member of AP and did not subscribe to the AP wire services previously furnished to appellant. The judgment is based upon the assessment of $1583.81 per week which was in effect on the date of termination of publication, less a saving to AP of $43 per week representing the cost of the wire and mechanical facilities, or net damages to AP of $1540.81 per week for 103 weeks.

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[2]In June 1954, appellant transferred ownership and publication of Times-Star to its wholly-owned subsidiary, The Cincinnati Publishing Company, which in turn sold the newspaper to Scripps four years later. Appellant's contract with AP was never assigned to its subsidiary. AP had no cause to deal with the subsidiary because appellant continued to act as a member. The District Court held that there was no novation within the requirements of Ohio law. This intervening period of ownership and operation by appellant's subsidiary is not considered to have any significance for the purposes of this appeal.

Appendix A

2) *The AP Wire Services*

Appellant alleges and appellee admits that AP has an established practice of requiring a member newspaper in the metropolitan cities of this geographical area of the United States to receive and pay for all three of its basic news wire services to such city, and, in addition, in Cincinnati, required appellant to receive and pay for the Kentucky wire as a part of the basic service. This practice, appellant contends, constitutes an unlawful tying arrangement in violation of Section 1 of the Sherman Act,[3] and renders the contract void and unenforceable.

This AP policy and practice of "tying" four wire services together in a single "package" and requiring that appellant take and pay for four wire services in order to receive any one of them is the principal issue on this appeal.

The wire[4] services provided by AP under its contract with appellant were described in a letter from AP's Chief of Bureau at Columbus, Ohio, to the editor of Post and Times-Star dated August 1, 1958, as follows:

> "Pursuant to our telephone conversation I am listing below the basic news service that was delivered to the Cincinnati Times-Star and is proposed to be delivered to the Post and Times-Star;
>
> "'A' *trunk circuit.* This is a general news wire carrying stories of top general interest.

---

[3] 15 U. S. C. § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

[4] The use of the word "wire" grows out of the earlier method of transmitting news over telegraph by Morse Code. The term is explained in the record as follows: "It is not a physical wire; it is an electronic channel. In many cases there is no wire, it is a wireless beam used by the telephone company or Western Union."

Appendix A

"'D' *trunk circuit.* This circuit carries financial stories, commodity quotations and other business news.

"Ohio Big Cities Circuit. This circuit carries Ohio, regional and general news copy.

"Kentucky regional. Two circuits, one operating in TTS style, one in all-caps, deliver Kentucky state news.

"Wirephotos. Full service on this facility consists of the delivery of glossyprints from day and night operation.

"The assessment for the basic minimum news service outlined above is $1,558.05 weekly.

"The assessment for Wirephoto service is $279.80 weekly.

"In addition, the Times-Star received various optional services * * *"

A stipulation of facts entered into between the parties describes the basic AP wire services furnished to Times-Star as follows:

"The leased wire news service referred to in the above contract between the AP and the Times-Star consisted of general news and stories of general interest carried and transmitted over the "A" trunk circuit; the financial stories, commodity quotations and business news carried and transmitted over the "D" trunk circuit; and the Ohio regional news and general news copy carried and transmitted over the Ohio Big Cities circuit."

Appendix A

3) *Times-Star's Efforts to Reduce Costs*

Faced with an operating deficit, appellant undertook, beginning in 1957, a stringent cost reduction program in an effort to make it possible for Times-Star to survive. A survey was made of AP, UP and INS wire costs. A substantial item of expenditure was the AP assessment, which at that time was $1,452.25 per week. Appellant determined that it did not need all of AP's basic news services. On August 14, 1957, appellant wrote a letter to AP, the text of which is printed in the margin.[5] A meeting was held in Cincinnati between representatives of AP and appellant on September 10, 1957, for the purpose of discussing a reduction in the basic news services. During this meeting appellant requested AP to furnish to it only the Ohio Big Cities circuit, which was considered the "most necessary" to appellant of the AP news services. This request would have eliminated the "A," "D" and Kentucky wires, and, if granted, would have effected a substantial reduction in appellant's operating costs. AP declined this request, stating that it was the practice of AP to require all members at Ohio trunk points to receive and pay for the "A," "D" and the Ohio Big Cities news wires, and that appellant must continue to pay the unit price for all these wires in order to receive any of them.

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[5]"We are undergoing a stringent cost reduction program at the *Times-Star* and in surveying our wire service costs, we feel that the Basic News Service charge of $1,452.25 weekly is excessive.

"Our files will show that we have greatly reduced the amount of AP copy that we are carrying and as we have no Sunday edition, many AP features are of no use to us.

"An analysis of our rates shows that a figure somewhere in the neighborhood of $700 per week would come much closer to our use of the service.

"We will anticipate discussion on the subject before taking any other action."

Appendix A

Previously appellant had requested information of AP as to how much was being paid for the Kentucky State wire. AP replied that:

> "The Kentucky state service, subject of your October 25 inquiry, is part of the basic Associated Press service in Cincinnati, and provision of this service is an integral part of the basic service covered by your Agreement.
>
> "There is a payment of $10.00 weekly toward maintenance of The Associated Press bureau in Lexington, but there is no separate charge for the Kentucky state wire other than that included in the contract figure. This wire is not one of the various optional services not covered by the contract figure."

Its request having been turned down, appellant continued to receive and pay for all of said basic services until continued operating losses of Times-Star compelled discontinuance of publication on July 19, 1958.

Immediately thereafter Scripps proposed to subscribe to the AP "A" wire trunk circuit service and to become an associate member of AP for that purpose. AP declined to provide "A" wire service to Scripps unless Scripps also would agree to subscribe to the "D" wire and the Ohio Big Cities wire (also known as the "S" wire). This policy of treating these three wire services as one inseparable "economic package" has been applied consistently by AP to metropolitan newspapers in this area of the United States, consisting generally of the area north of the Mason-Dixon line and east of Kansas City, Missouri.[6]

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[6]AP has approximately 250,000 miles of leased news wire connecting most of the cities of the United States. This network of

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In addition to asserting that this "tying arrangement" was a violation of the Sherman Act and a valid defense against AP's breach of contract action, appellant filed a counterclaim seeking $157,366.92 in treble damages against AP under the Sherman Act.

The district judge ruled that:

> "The Sherman Act's interpretation has broadened considerably since the early tie sales cases which involved products tied to patent products. It is entirely possible that the Plaintiff's method of dispensing its news is in violation of the Sherman Act." But that: "Defendant has failed to provide this Court with sufficient facts upon which it may be concluded that there is a natural division in the cost of gathering news transmitted over the A, D, and State trunks. Without such a complete division,

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wires is leased by AP from the American Telephone and Telegraph Company and the Western Union Telegraph Company. In each AP office and in the office of each AP member where there are AP employees, there is one transmitting machine and one receiving machine attached to each circuit for the purpose of transmitting and receiving news on the circuit. Each member that uses this kind of equipment leases it from AP and pays AP for it. There are approximately 43 metropolitan areas throughout the country including Cincinnati, which are considered by AP to be "trunk point cities." These cities make up the major newspaper markets of the United States.

News originating in the United States is not sent to a single point, but is transmitted to AP members directly from the AP news bureau in the area in which the news originates. News from abroad is sent to AP offices in New York, from which it is transmitted throughout the United States. Leased wire services furnished to newspapers in smaller cities are transmitted over a single circuit, and to members in large cities over multiple circuits. As held by the District Court: "These multiple circuits, commonly called trunks, have come into existence because, under present technology, it is impossible to transmit all state, national and international news on one circuit."

it is unnecessary and futile to explore the other elements of the alleged tying agreement."

The district court ruled that on the "paucity of facts," appellant cannot prevail either in asserting violation of the Sherman Act as a defense or under its counterclaim.

4) *Application of Sherman Act to AP—*

It is clear that the Associated Press is subject to the provisions of the Sherman Act. As said by the Supreme Court in Associated Press v. United States, 326 U. S. 1, 7, 65 S. Ct. 1416, 1418, 89 L. Ed. 2013:

> "Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. See International News Service v. Associated Press, 248 U. S. 215, 229, 230 [39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293]. All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."

It follows that if an illegal tying agreement is established by the evidence in this case, AP cannot escape the consequences on the theory that it is a mutual and cooperative association, distributes news only among its own members, pays no dividends, defrays its expenses through assessments, and does not "sell" news for a "price."

Appendix A

5) *The "Tying" Arrangement*

The burden of proving that a contract is illegal is upon the party asserting it, which in this case is appellant. Palmer v. Chamberlin, 191 F. 2d 532, 27 A. L. R. 2d 416 (C. A. 5); Illinois Surety Co. v. O'Brien, 223 F. 933 (C. C. A. 6).

It is undisputed that AP refused to furnish the Ohio Big Cities news circuit separately to appellant and required that appellant, against its own will and business judgment, continue to subscribe and pay for three services which it did not want, the "A," "D" and Kentucky wires, in order to receive the Ohio regional wire which appellant considered to be essential to its operations. Do the facts concerning this practice, which has been adhered to consistently by AP ever since establishment of the "D" wire in 1935, coupled with evidence concerning other essential elements of antitrust violation as hereinafter discussed, constitute a violation of Section 1 of the Sherman Act under the record in this case? If so, it is axiomatic that the contract between appellant and AP is "illegal" under the express terms of the statute. 15 U. S. C. § 1. A party to an illegal bargain cannot "recover damages for breach thereof." Restatement, Contracts, § 598; also § 514, special note. As said by the Supreme Court in United States v. Loew's Inc., 371 U. S. 38, 51, 83 S. Ct. 97, 105, 9 L. Ed. 2d 11: "[T]he thrust of the antitrust laws cannot be avoided merely by claiming that otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives."

A tying arrangement has been defined as follows:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one

> product but only on the condition that the buyer also purchase a different (or tied) product * * *." Northern Pacific Railway Co. v. United States, 356 U. S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545.

Such arrangements are frowned upon and in some situations are declared unlawful *per se* because, as the Supreme Court has pointed out: "[T]ying arrangements serve hardly any purpose beyond the suppression of competition." Northern Pacific Railroad Co. v. United States, 356 U. S. 1, 6, 78 S. Ct. 514, 518; Black v. Magnolia Liquor Co., 355 U. S. 24, 25, 78 S. Ct. 106, 2 L. Ed. 2d 5; Standard Oil Co. of California v. United States, 337 U. S. 293, 305, 69 S. Ct. 1051, 93 L. Ed. 1371.

6) *Separability*

AP insists that it is engaged in distributing only one product, news from all parts of the world—international, national and local—and that the news transmitted by it is so intermingled that it is inseparable; that although news is transmitted to metropolitan newspapers over several circuits, these circuits are interdependent and form an integrated whole in the delivery of the leased wire news service; that the means by which news is transmitted does not determine the character of the news; and that the leased AP wire news service is a single product and not several separate and distinct products. AP relies upon the proposition that the essential element of an illegal tying agreement is an obligation imposed by one party upon another to take or purchase an unwanted product as a condition to obtaining a desired product, and that a tying agreement cannot exist within the

meaning of the antitrust laws unless the sale of one product is conditioned upon the the purchase of another separate and distinct product.

The question of separability is the first issue to be determined on this appeal. In disposing of this issue, however, it is not necessary to pass upon the separability of all four of the wire services furnished by AP to appellant. We are not required to decide whether the "A" wire is separable from the "D" wire, since Times-Star concluded that it did not want or need either of these services. Neither are we required to decide whether the Kentucky State wire was separable from the other services. The only issue of separability is whether the Ohio Big Cities wire was a separable product as distinguished from the other three wires; that is, was the Ohio Big Cities wire, the "tying" product, separable from the "A", "D" and Kentucky wires, the "tied" product.

Even if it be concluded that the Ohio Big Cities wire was used principally to transmit news of regional and local interest and that the other wire services were used principally to transmit news of different classifications, we are faced with the problem of whether the Ohio wire represents a separate product, or whether it and the other three services involve but *one* product, that is, news. Though separability of products is an element in every tying case, it has rarely posed a problematical issue before the courts. See United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 559, n. 25 (E. D. Pa.), aff'd, per curiam, 365 U. S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806, rehearing denied, 365 U. S. 890, 81 S. Ct. 1026, 6 L. Ed. 2d 200.

In adjudicating the question here involved, we begin by looking to those few cases which bear on separability, although each of them involves distinguishable facts.

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In Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 73 S. Ct. 872, 97 L. Ed. 1277, the Supreme Court held that a New Orleans publishing company did not violate the antitrust laws in requiring that advertising space be purchased in both the morning and afternoon newspapers. One of the reasons for the Court's holding was its difficulty in delineating two distinct products. The Court said:

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same." 345 U. S. at 614, 73 S. Ct. at 883.

AP relies heavily upon Times-Picayune in support of the district court. It should be noted, however, that the rationale of Times-Picayune as to "market dominance" was weakened by the subsequent decision in Northern Pacific Railroad Co. v. United States, supra, 356 U. S. 1, 78 S. Ct. 514. Furthermore, in contrast to Times-Picayune on the tying issue, there was a dominant "tying" product in the instant case as applied to appellant, to wit, the Ohio Big

Cities news service. This was the "tying" product which appellant considered essential to its operations, while not desiring to continue its subscription to the "tied" products, the "A," "D" and Kentucky State wires. It should be added that, as to the force of Times-Picayune as a precedent, one court recently said: "Furthermore, the Times-Picayune case has been limited to the exact set of facts before the court * * *." American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848, 850 (S. D. N. Y.).

In United States v. Loew's Inc., supra, 371 U. S. 38, 83 S. Ct. 97, the defendants distributed motion picture films to television stations by the method known as block booking; that is, TV stations were required to purchase a package of films to get any at all. In this way film producers were able to tie bad films to the desirable ones. It was argued, *inter alia*, that "movies" were a single product and that there was no separability of two distinct products. The Court answered this contention by saying: "The district judge found that each copyrighted film block booked by appellants for television use 'was in itself a unique product'; that feature films 'varied in theme, in artistic performance, in stars, in audience appeal, etc.,' and were not fungible. * * *" 371 U. S. at 48, 83 S. Ct. at 104.

A decision in which the facts have some analogy to the instant case is American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., supra, 221 F. Supp. 848 (S. D. N. Y.). There Kemper Insurance desired to sponsor an ABC television program on 95 affiliated stations. These stations were geographically situated where Kemper's advertising would be most effective. ABC refused the offer unless Kemper would also sponsor the program on 35 additional stations. ABC argued

that only one product was there involved, to wit, sponsorship of TV programs, and that there was no separability of two or more distinct products. The court disagreed, saying that 35 undesirable stations are not the same as 95 desirable stations. 221 F. Supp. at 850.

A leading case in this area, for its discussion of separability of products, is United States v. Jerrold Electronics Corp., supra, 187 F. Supp. 545 (E. D. Pa.), aff'd per curiam, 365 U. S. 567, 81 S. Ct. 755, rehearing denied, 365 U. S. 890, 81 S. Ct. 1026, involving master television antenna systems for dealers, apartment houses and communities normally unable to receive television signals. Jerrold would not sell its equipment unless the customer would also purchase a service contract which would assure Jerrold supervision over the installation and maintenance; and also would not sell its various items of equipment designed for community antenna systems separately, but would only sell them as components of a complete system. In holding that this practice violated the Sherman Act, the court first passed upon the question of separability. This issue was stated as follows:

> "The difficult question raised by the defendants is whether this should be treated as a case of tying the sale of one product to the sale of another product or merely as the sale of a single product. It is apparent that, as a general rule, a manufacturer cannot be forced to deal in the minimum product that could be sold or is usually sold. On the other hand, it is equally clear that one cannot circumvent the anti-trust laws simply by claiming that he is selling a single product." 187 F. Supp. at 559.

The court then proceeded to state four criteria of separability which are discussed hereinafter at page 764 [pp. 21a-22a, *infra*] of this opinion.

In Dehydrating Process Co. v. A. O. Smith Corp., 292 F. 2d 653 (C. A. 1), cert. denied, 368 U. S. 931, 82 S. Ct. 368, 7 L. Ed. 2d 194, relied on by the district court in the instant case, the defendant manufactured silos and an unloader which could be installed at the base of a silo. For six years defendant made it a practice to sell its unloader separate from its silo. A number of customers complained that the unloader would not operate successfully on silos of another make. To meet this problem, defendant adopted a policy of not selling unloaders unless they were to be installed in presently-purchased or already-owned silos of its own manufacture. The question was whether this was a tying arrangement which violated the anti-trust laws.

The court held that in light of the customer complaints the defendant was justified in adopting its new policy; and that the requirement that the unloaders be installed only in defendant's silos was reasonable under the circumstances.

Thus it will be seen that the court's decision does not really turn on the question of inseparability. In fact, by basing its decision on "sound business reasons," the court would seem to presuppose that there are two separate products.

The Dehydrating Process Co. case obviously would be more nearly analogous on its facts to the instant case if the manufacturer had required the purchase of an unloader as a prerequisite to the purchase of a silo.

One of the evils inherent in any tying arrangement is that it forces the buyer to give up his independent judgment as to whether, or where, to purchase the tied product. United States v. Loew's Inc., supra, 371 U. S. 38, 45, 83

S. Ct. 97; Northern Pacific Railway Co. v. United States, supra, 356 U. S. 1, 6, 78 S. Ct. 514.

Turning again to the instant case, there can be no doubt that the arrangement here involved forced the publishers of Times-Star to give up their independent judgment as to which of the wire services was required for its operations. At the time AP refused to furnish appellant the Ohio Big Cities wire to the exclusion of the "A," "D" and Kentucky wires, Times-Star was a subscriber to various other wire services. It began using certain UP services in July 1955, and at that time already was an AP and INS subscriber. It was receiving the UP national wire, state wire and sports wire.

Certain of these services were duplications. Appellant's executives, in an effort to combat an operating deficit, concluded that the AP "A," "D" and Kentucky services no longer were required. The amount of AP copy published in Times-Star had been greatly reduced. The former assistant to the publisher of Times-Star testified that "we had good coverage in Northern Kentucky" and "had quite a staff over there," and that the AP Kentucky wire was no longer needed. He further said that if the AP "D" wire had been dropped as requested, he would have subscribed to the UPI financial wire. On the other hand he described the AP Ohio Big Cities wire as "essential" to the publication of Times-Star. The former Times-Star telegraph editor testified that the AP Ohio Big Cities wire "was far superior to the United Press state service." The former publisher of Times-Star described the Ohio Big Cities wire as "the major service of The Associated Press" for Times-Star purposes, and said that "we needed that service very badly."

In this situation, who better than appellant was in a position to choose which wire services it needed and wanted and to exercise independent judgment to that end?

Yet the record clearly establishes that AP required appellant to continue to subscribe and pay for three wires which appellant did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services. This is one of the situations which is "an object of anti-trust concern." United States v. Loew's Inc., supra, 371 U. S. 38, 44-45, 83 S. Ct. 97, 102.

Lending support to the view that the Ohio Big Cities wire is separable from its other wires is AP's treatment of the Kentucky wire. AP had refused to give Times-Star a separate quotation for this wire, taking the position that it was a part of the basic service for Cincinnati. Earlier in this opinion we have quoted AP's statement in a letter to appellant that the Kentucky wire was "part of the basic Associated Press Service in Cincinnati, and provision for this service is an integral part of the basic service covered by your agreement." When Scripps bought the paper in 1958, and proposed to subscribe to the "A" wire, AP agreed to eliminate the Kentucky wire from its basic service, thereby reducing the assessment by $240.60 per week. It had refused to quote a separate assessment to appellant for the Ohio Big Cities wire, yet it was able to quote a separate charge to Scripps for the Kentucky wire. Thus the cost of the Kentucky wire was separated for Scripps. The parallel conclusion as to the separability of the Ohio Big Cities wire seems obvious to us.

By this action AP demonstrated, contrary to the findings of the district court, that the cost of a state wire can be separated from the cost of its other wire services. On the question of the separability of charges we see no dif-

ference between the Kentucky State wire and the Ohio Big Cities regional wire.

Further, the AP sports wire, which formerly was a part of the basic wire service, was separated and a specific charge was made therefor. AP permitted Times-Star to cancel this separate service in 1956. Other services, such as the wirephoto service, were provided by AP on an optional basis, and for specific separate charges.

The evidence further establishes that the Ohio Big Cities wire was operated at different hours from the other services. The Ohio wire was controlled from Columbus, Ohio, while the other wires were controlled elsewhere. The Ohio wire was physically separable in that it connected different cities and could be added to or taken from the service provided to any newspaper. The "A" wire connected 193 larger cities; the "D" wire connected 56 cities; the Ohio Big Cities wire connected ten cities in Ohio and West Virginia, two of which did not receive the "D" wire and one of which did not receive either the "A" wire or "D" wire. Separate receiving equipment was required for each wire.

In support of its contention that its news services are not separate and distinct products, AP introduced evidence that the "D" wire sometimes is used for the transmission of general news in addition to business, financial and market news, particularly if the "A" wire at the moment cannot accommodate such news; that general news of all kinds in addition to regional news is transmitted over the Ohio Big Cities wire; that news from abroad on occasion has been carried on all of the wires in question; and that if there were four or five major stories coming in at one time, it might be impossible to put them all on one wire, and the excess would be "spilled over" on other wires. Although

news may be "spilled over" from the other wires to the Ohio Big Cities wire when the AP circuits are overloaded, this fact was well known to appellant. It was the prerogative of appellant to decide whether it chose to subscribe only to the Ohio Big Cities service, and thereby take the chance of receiving incomplete "spilled over" news of international, national and financial events in addition to the regional and local news carried over the Ohio Big Cities wire.

With reference to the practice of "spilling over" news, the record shows that news from the "A" wire sometimes is "spilled over" on the "D" wire or on the Ohio Big Cities wire, and that "A" and "D" wire news may be "spilled over" on the Ohio Big Cities wire, but we find no evidence that the Ohio regional news which Times-Star considered so essential to its operation was "spilled over" on the "A," "D" or Kentucky wires. Quite obviously it would be rare indeed for news of local and regional interest carried over the Ohio wire to ten cities in Ohio and West Virginia to be "spilled over" on the "A" wire connecting 193 cities, the "D" wire connecting 56 cities, or the Kentucky state wire carrying news of primary interest to readers in the Kentucky area.

It is clear that Times-Star found it necessary to continue its subscription to the Ohio Big Cities wire because this was the only wire service providing satisfactory coverage of news of regional and local interest. AP contends that the transmission of regional and local news did not make the Ohio wire separable, because there are duplications of news carried on this and other wires. The evidence shows, however, that when there is a duplication, it is because the duplicated news item is a matter of interest to newspaper readers in the Ohio area. For example, if the

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President of the United States spoke at Cleveland or Columbus, Ohio, the story would be transmitted over the "A" wire and also over the Ohio Big Cities wire. A financial story of nationwide interest originating in Ohio might be carried over both the "D" wire and the Ohio Big Cities wire. If a major accident occurred in Ohio, resulting in a substantial number of deaths, it would be carried over the "A" wire, and perhaps also over the Ohio Big Cities circuit. A minor accident in Ohio resulting in one death ordinarily would be reported only over the Ohio Big Cities circuit.

In United States v. Jerrold Electronics Corporation, supra, the court laid down four criteria of separability as follows:

> "There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered all of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum for the total system. Finally, while Jerrold had cable and antennas to sell which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it." 187 F. Supp. at 559.

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Transposing these four criteria of separability to the facts of the instant case, we find:

1. AP's competitor, UPI, offered everything necessary for a complete news service, but did not charge for its basic wires in a single package as did AP;

2. The number of news dispatches of AP and other news services vary considerably and are used by newspapers as space and interest warrant. Hardly any two versions are the same;

3. UPI charges separately for its news wires, as does AP for the Kentucky wire (at least in its proposal to Scripps), the sports wire, and various supplemental wires;

4. Finally, AP offered certain wires on an optional basis, but required appellant to subscribe for the "A" wire, "D" wire and Kentucky wire on a "package" basis in order to receive the Ohio Big Cities wire.

It is true that no tying arrangement is spelled out expressly in the contract between the parties upon which AP based this action, or in the AP By-Laws. The result is accomplished by the By-Law provision that the nature and extent of the news service to be furnished a member shall be determined by the Board of Directors.[7]

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[7]Article VII, Section 1 and 2 of the By-Laws, entitled "Use of News," provides as follows:

"Sec. 1. The nature and extent of the news service to be furnished to a member shall be determined by the Board of Directors, upon the member's admission, and the initial assessment shall be fixed at the same time and by the same authority. Both the nature and extent of such news service and the assessment may be changed from time to time by the Board of Directors, provided that the Board of Directors shall not

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A tying arrangement or condition "need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct." Osborn v. Sinclair Refining Co., 286 F. 2d 832, 837 (C. A. 4), cert. denied, 366 U. S. 963, 81 S. Ct. 1924, 6 L. Ed. 2d 1255. The tying arrangements found unlawful in United States v. Loew's Inc., supra, and United States v. Paramount Pictures, Inc., 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260, were not spelled out in contracts. As said in McElhenney Co. v. Western Auto Supply Co., 269 F. 2d 332, 338 (C. A. 4):

> "Admittedly, the written agreement between the parties contains no provision requiring the franchisees to deal only in goods supplied by Western Auto. This, of course, merely means that the contract is not unlawful on its face. The writing could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found."

The district court laid strong emphasis upon its finding that the record in this case contains insufficient evidence to establish a natural division in the costs of gathering news transmitted over the "A," "D" and Ohio Big Cities wires

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omit the news service to any member except for cause as provided in these By-Laws.

"Sec. 2. Each member shall take the news service of the Corporation as specified in Section 1 of this article and use it in whole or in part as provided in his or its contract with the Corporation and in conformity with the By-Laws thereof."

Paragraph 6 of the contract between the parties provides:

"In the event that any of the terms and conditions of this agreement shall be or become contrary to or inconsistent with the By-Laws of the Associated Press, the By-Laws shall control."

and the amounts of the costs to AP of providing these respective services. It expressly held that appellant "has failed to provide this court with sufficient facts upon which it may be concluded that there is a natural division in the costs of gathering news transmitted over the A, D and state trunks." A finding of fact by the district court is binding upon this court unless "clearly erroneous." Rule 52(a), Fed. R. Civ. P. It is our obligation as an appellate court to overrule the "clearly erroneous" findings of the district court in an anti-trust case, as in other civil actions tried by a district judge without a jury. Osborn v. Sinclair Refining Co., supra; A. C. Becken Co. v. Gemex Corp., 272 F. 2d 1 (C. A. 7), cert. denied, 362 U. S. 962, 80 S. Ct. 878, 4 L. Ed. 2d 876; Ball v. Paramount Pictures, 169 F. 2d 317 (C. A. 3), cert. denied, 339 U. S. 911, 70 S. Ct. 568, 94 L. Ed. 1337; 6 Toulmin's Anti-Trust Laws, § 21.24 (1951). As said in United States v. U. S. Gypsum Co., 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We agree with the district court that such evidence would be indispensable to support the counterclaim filed by appellant. The only evidence in the record on this question was offered by an accountant employed by appellant for the purpose of allocating the basic AP assessment among the "A" wire, the "D" wire and the Ohio Big Cities wire. We agree with the district court that this evidence was too speculative to support the counterclaim filed by appellant for the recovery of treble damages against AP. The record shows that AP did not keep its records in such a manner as to establish an accurate division of costs as between its

three basic wire services. We are of the opinion, however, that the determination of the existence of a tying arrangement which is illegal under the Sherman Act, thus constituting a complete defense to AP's action for breach of contract, is not controlled by the way AP has kept its cost records.

AP was able to arrive at a specific charge of $240.60 per week for its Kentucky wire when it decided to offer this concession to Scripps. The AP wirephoto service was priced separately at $278.80 per week. Separate charges also were established for the sports wire and other optional services, some of which formerly were a part of the basic service. We have no doubt that a division could be made by AP for a separate charge for its Ohio Big Cities wire. Once it is determined that separability exists, it is not important that AP might experience inconvenience in making a breakdown of charges.

The basic error of the district court was in holding that, in order to establish its affirmative anti-trust defense, it was obligatory upon appellant to prove that there was a natural division of costs in gathering news transmitted over the Ohio Big Cities wire and the other wires in question. We do not construe the decisions to impose such a burden upon a defendant asserting an anti-trust defense. Once the other elements of an unlawful tie-in have been established, appellant's defense should not be nullified by the manner in which AP keeps its books or the unavailability of cost records upon which a precise computation of separate costs could be made.

We hold that this finding of fact by the district court was based upon an incorrect premise and was "clearly erroneous" as applied to the Ohio Big Cities wire. This holding applies *only* to the Ohio Big Cities wire. We do not

hold that the AP "A" and "D" are distinct products separable the one from the other, nor do we hold that the AP "B" wire, which is in use in certain areas other than Cincinnati, is a separate and distinct product. Our holding on the issue of separability is limited solely to the Ohio Big Cities wire; that is, that the Ohio regional wire is separable and distinct from the other three wires involved in the contract between AP and appellant.

It is our opinion that the facts hereinabove set forth establish that the Ohio Big Cities wire was a product separate and distinct from the other AP wire services, just as were motion picture films in United States v. Loew's Inc., supra, the television program in American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., supra, and the community television antenna equipment in United States v. Jerrold Electronic Corporation, supra. We further hold that the established practice of AP in requiring appellant to receive and pay for the "A" and "D" wires, plus the Kentucky state wire, as a prerequisite to receiving the Ohio Big Cities wire, constituted a tying arrangement susceptible to violation of Section 1 of the Sherman Act.

A holding that the Ohio Big Cities wire was separable and that offering it with the other three services in a "package" constituted a tying arrangement does not necessarily mean, however, that the arrangement automatically will be declared unlawful. Other essential elements of anti-trust violation also must be established. In Northern Pacific Railway Co. v. United States, supra, 356 U. S. 1, 6, 78 S. Ct. 514, 518, the court said that tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for

the tied product and a 'not insubstantial' amount of interstate commerce is affected. International Salt Co. v. United States, 332 U. S. 392, [68 S. Ct. 12, 92 L. Ed. 20]. Cf. United States v. Paramount Pictures, 334 U. S. 131, 156-159, [68 S. Ct. 915, 92 L. Ed. 1260]; United States v. Griffith Amusement Co., 334 U. S. 100, [68 S. Ct. 941, 92 L. Ed. 1236]."

7) *Sufficient Economic Power*

We come now to the questions of whether AP had "sufficient economic power" with respect to its wire services to restrain free competition in the market for such services and whether a "not insubstantial" amount of interstate commerce is affected.

On the issue of whether AP possessed "sufficient economic power" with respect to its basic news services within the contemplation of the anti-trust decisions, we first emphasize its position of dominance in the field of news. In 1958 it was the largest single news service in the United States, with approximately 150 news bureaus and offices, and a staff of approximately 3500 staff members and employees in this country and foreign countries. Of the total of approximately 1750 English language daily newspapers in the United States, 69 per cent are AP members. In 1957 and 1958 the membership consisted of approximately 1250 regular members which were owners of newspapers, 275 of which were morning newspapers and 975 of which were afternoon newspapers, and approximately 1700 owners of radio and television stations. There were approximately twelve associate members which owned and published newspapers. AP members are located at every newspaper market in the United States. The newspapers of AP mem-

bers cover at least 90 per cent of the nation's population area.

AP was described by the Supreme Court in Associated Press v. United States, supra, 326 U. S. 1, 18, 65 S. Ct. 1416, 1424, as follows: "'AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence.'"

a) Uniqueness

The majority opinion of the Supreme Court in Northern Pacific is to the effect that uniqueness alone may establish "sufficient economic power." In Loew's, the Court held in a unanimous opinion that:

> "Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, *the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.*" 371 U. S. at 45, 83 S. Ct. at 102 (Emphasis supplied).

In American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., supra, 221 F. Supp. 848 (S. D. N. Y.), the Court held that the television program there involved "is of a unique nature sufficient to give ABC a leverage to gain economic power over the tying product." 221 F. Supp. at 850.

While a patent or copyright is no longer held to be an essential prerequisite to illegal tying arrangements, the

monopoly created by a patent or coyright has been emphasized strongly in many opinions, including United States v. Loew's Inc., supra.

The evidence in this case demonstrates that AP asserts property rights in its news dispatches which are comparable to a copyright. In International News Service v. Associated Press, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, the Supreme Court held that AP has a quasi-property right in the news it gathers and distributes, as against a rival in the same business. The Court compared this interest to a common law copyright in a literary composition and held that it was not abandoned upon first publication.

Since prior to 1929 AP has required each newspaper using its news dispatches to print the following notice:

> "The AP is exclusively entitled to the use for reproduction of all news dispatches credited to it or not otherwise credited in this newspaper and also local news published therein."

An AP official testified that the purpose of this notice is to protect both AP and its members, warning that "anyone who gets a copy of a newspaper is not entitled to lift and sell the news" or reuse it in any way.

We, therefore, conclude that AP news dispatches not only are unique, but they possess a uniqueness "to suggest comparison with a monopoly by patent." Northern Pacific Railway Co. v. United States, supra, 356 U. S. 1, 19, 78 S. Ct. 514, 525 (dissenting opinion).

b) Desirability of Tied Product

As stated in Loew's, supra, one test of "sufficient economic power" is the desirability of the tied product to

purchaser. There can be no doubt of the desirability of AP's news wires to newspapers.

> "Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which but for these restrictions, might be published in the future." Associated Press v. United States, supra, 326 U. S. 1, 13, 65 S. Ct. 1416, 1421.

Appellant found the Ohio Big Cities wire to be so desirable and indispensable to its requirements that, when AP refused to furnish it except when "tied to" three other wires, appellant continued to subscribe to and pay for all four wires, although it desired only the Ohio regional service and was experiencing a recurring operating deficit.

Both uniqueness and desirability having been established, it follows that "sufficient economic power" will be inferred. United States v. Loew's Inc., supra, 371 U. S. at 45, 83 S. Ct. 97.

8) *Effect on Interstate Commerce*

We come next to the question of whether a " 'not insubstantial' amount of interstate commerce is affected." Northern Pacific Railway Co. v. United States, supra, 356 U. S. 1, 6, 78 S. Ct. 514, 518.

The activities of AP are interstate commerce. Associated Press v. N. L. R. B., 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953. AP's contract with appellant was a standard contract, which it required to be executed by all its members. The practice of tying news wire services to-

gether has been followed by AP continuously since 1935, when the separate "D" wire was first established. This tying practice has been a requirement that has continued with no variation. The newspaper circulation of members of AP at the 43 principal metropolitan trunk points in the United States comprises 94 per cent of the total circulation of all newspapers in these areas subscribing to news service agencies. They comprise 87 per cent of all subscribing newspapers in these areas. More daily newspapers throughout the nation subscribe to AP than to any other news service. In short AP is the chief source of news for the American press.

While there is no proof in this case as to precise percentages, there can be no doubt that the amount of commerce affected or restrained by the tying practice is substantial. Standard Oil Co. of California v. United States, supra, 337 U. S. 293, 69 S. Ct. 1051; International Salt Co. v. United States, supra, 332 U. S. 392, 68 S. Ct. 12; Osborn v. Sinclair Refining Co., supra, 286 F. 2d 832 (C. A. 4), cert. denied, 366 U. S. 963, 81 S. Ct. 1924.

When appellant has established that a tying arrangement exists, coupled with "sufficient economic power to impose an appreciable restraint on free competition in the tied product" affecting a "not insubstantial" amount of interstate commerce, its defense under the Sherman Act does not require affirmative evidence of actual harm to competition or the extent of such harm. Northern Pacific Railway Co. v. United States, supra, 356 U. S. 1, 12, 78 S. Ct. 514; Standard Oil Co. of California v. United States, supra, 337 U. S. 293, 305, 69 S. Ct. 1051.

The impact of the tying arrangement upon competition is illustrated by the fact that if Times-Star had been permitted to drop the AP "D" (financial) wire as requested,

it would have subscribed to the UPI financial wire. By adhering to its tying arrangement, AP precluded its competitor, UPI, from selling its financial wire to Times-Star, and prevented Times-Star from subscribing to a competing financial wire which it considered to be more desirable for its purposes.

In International Salt, the Court said: "[I]t is unreasonable, *per se*, to foreclose competitors from any substantial market" by means of tying arrangements. 332 U. S. at 396, 68 S. Ct. at 15. In Loew's, the Court said:

> "Moreover, there can be no question in this case of the adverse effects on free competition resulting from appellants' illegal block booking contracts. Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations." 371 U. S. at 48, 49, 83 S. Ct. at 104.

It is a reasonable conclusion under the evidence in this case that "a 'not insubstantial' amount of interstate commerce is affected."

9) *Illegality of Contract as Defense*

Finally, there is an ancillary proposition which should be discussed. Here appellant raises the question of the unlawfulness of the contract by way of defense. The Supreme Court has said: "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a

purchaser in an action to recover from him the agreed price of goods sold." Kelly v. Kosuga, 358 U. S. 516, 518, 79 S. Ct. 429, 431, 3 L. Ed. 2d 475. This holding is rooted in the principle that a party to an illegal contract cannot subsequently use this illegality to avoid his contractual obligations. The Court went on to note, however, that this view will not apply "* * * where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act. * * *" 358 U. S. at 520, 79 S. Ct. at 432.

We do not construe Kelly v. Kosuga, supra, to preclude appellant from asserting Section 1 of the Sherman Act as a defense to the instant action for breach of contract. Appellant has paid for all AP services ever received by it. The Sherman Act is interposed as a defense, not to defeat an obligation for services received, but to avoid paying weekly assessments for two years after appellant had ceased publication of Times-Star and had sold its newspaper. Although a plea of illegality based on the Sherman Act is not favored in actions based on contracts, the statute by its express terms declares contracts in violation thereof to be illegal. 15 U. S. C. § 1. Illegality of the contract under the Sherman Act is a valid defense. Bement & Sons v. National Harrow Co., 186 U. S. 70, 87, 88, 22 S. Ct. 747, 46 L. Ed. 1058.

> "At an early date it was recognized that, despite the absence of a provision in the Sherman Act authorizing a defense of illegality in a private suit on a contract, such a defense might be used; that any one sued upon a contract may set up as a defense that it is a violation of anti-trust laws, and if found to be so, that fact will constitute a good defense to the action." 6 Toulmin's Anti-Trust Laws, § 18.3 (1951).

Appendix A

Having found a violation of Section 1 of the Sherman Act, this court will not enforce the contract by requiring appellant to pay for two years of service it never received, and thereby enforce "* * * the precise conduct made unlawful by the Act * * *" 358 U. S. at 520, 79 S. Ct. at 432.

(10) *The Counterclaim*

We affirm the action of the district court in dismissing appellant's counterclaim, since the evidence of damages is too speculative to support the counterclaim. Judgments in anti-trust cases cannot be rendered on speculation or guesswork, even against a party who by his own wrong has precluded a more precise computation of damages. Bigelow v. RKO Radio Pictures, 327 U. S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652; Volasco Products Co., 308 F. 2d 383, 392 (C. A. 6), cert. denied, 372 U. S. 907, 83 S. Ct. 721, 9 L. Ed. 2d 717.

The judgment of the District Court awarding damages against appellant is reversed and the case is remanded with instructions to dismiss the complaint.

O'SULLIVAN, Circuit Judge (dissenting).

I regret my inability to agree with the learned, exhaustive and painstaking opinion of my brothers. The critical holding of such opinion is that, *as a matter of fact*, the variety of news furnished over AP's Ohio wire constitutes a commodity distinct and separate from the news furnished over its other wire services and that AP must, for a separate price and without purchase of other services, supply the Ohio wire to any member of AP who requests it. This the Associated Press must do under the majority's holding lest it stand convicted of violating Section 1 of the Sher-

man Act, 15 U. S. C. A. § 1, which provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

Defendant-appellant, Taft-Ingalls Corporation,[1] as a publisher of the Cincinnati Times-Star had been a member of the Associated Press since the latter was formed in 1900. Under its contract in force with the AP at the times here involved, it had agreed as a member of AP to receive, use and pay for at a single price, the news brought to it by the three wires then employed by AP to distribute to its metropolitan city members news "of all kinds" gathered by AP's people domestically and worldwide. It seems fair to assume from the evidence that a metropolitan daily could not operate without receiving from some source all of the news that AP furnished over these three wires. The Cincinnati Times-Star also subscribed to some of the services of United Press International, the other major news gatherer, as did the publisher of the Cincinnati Post and Times-Star after the consolidation. The editor of the Cincinnati Post and Times-Star testified that even if he could have obtained the AP's general news A wire alone, he would not quit receiving the news provided by United Press and that a metropolitan daily could not operate with AP's A wire alone.

Preliminarily, I observe that the activities of the Associated Press, notwithstanding that it is a mutual membership organization, are subject to and can be found to

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[1]Taft-Ingalls Corporation is the same corporation that published The Cincinnati Times-Star newspaper through a subsidiary, and its previous corporate name was The Cincinnati Times-Star Company. I shall refer to it herein as Times-Star.

violate the Sherman Act. Associated Press v. United States, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945). Yet I would like to pose at the outset the query whether the present case is properly susceptible to decision in terms of the classic "tying" analysis. The Supreme Court has made it clear that the inherent vice of tying arrangements is that they allow a seller to extend into one sphere a power developed in another sphere, thereby suppressing competition on the merits and taking unfair advantage of an otherwise legitimate market power. E.g., Northern Pac. Ry. Co. v. United States, 356 U. S. 1, 6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). In my own mind, the inquiry into product separability is in the present case an awkward approach to the question whether AP has been guilty of wide-scale tying arrangements. A broad view of the record reveals that AP was created by newspapers as a mutual association for the purpose of gathering and disseminating to members as much news as rapidly and as accurately as possible. As it has developed, the costs of the enterprise are not assessed against members on the basis of the actual cost of delivering news to them; rather, each is assessed by a formula which seeks to determine the amount of benefit each member derives from the service rendered. AP's position may be seen as fundamentally the position that it should be allowed to admit only members who are willing to participate in, and bear their fair share of the cost of, this undertaking to provide comprehensive news coverage. I would prefer to deal with this position squarely, applying the rule of reason to the situation as it stands, instead of forcing analysis into the artificial "tying" mould in which the arrangement is per se illegal "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a

'not insubstantial' amount of interstate commerce is affected." Northern Pac. Ry. Co. v. United States, supra, 356 U. S. 6, 78 S. Ct. 518.

Approaching AP's overall setup from general rule of reason analysis, I am persuaded that it is reasonable. There is no evidence whatever that members have been inveigled into undesired commitments by an extension of one form of power into an area where there is no power. Instead, the present record shows only a situation where a rational and fair system of apportioning the costs of a mutual undertaking would be jeopardized, if not entirely defeated, by requiring the admission of members who do not wish to share in the entire enterprise. Assume for a moment that the Times-Star were admitted solely for the purpose of receiving news of Ohio events under compulsion of the majority's reasoning. Can any fair system be devised to allocate a fair share of AP's total costs to the Times-Star and other possible choosy members? Should AP be coerced into a difficult and arbitrary undertaking by interpreting the Sherman Act to find two or more products are here involved in a tying arrangement? Times-Star's own expert accountant, one Batzer,[2] readily admitted that he was unable to find any way to intelligently allocate to the Ohio Big Cities wire, if taken alone, a proper portion of the total cost of the AP basic news service. This, in my view, supports the trial court's finding of inseparability. To illustrate, may I hypothesize a single newsworthy event. AP's man in Cairo, Egypt gets information that a prominent Cincinnatian is

[2]This witness' firm, Lybrand, Ross Brothers and Montgomery, engaged by Times-Star's counsel, sent ten or more of their people into the home office of AP as part of an attempted cost study in the hope, I assume, that it would be of significant support to Times-Star's case.

killed in Cairo, together with other Cairo news of worldwide interest; he sends this bundle of news to the AP bureau in New York, and from there it goes to the AP bureau at Columbus on the B wire; the chief there picks off the item of the death of the Cincinnatian and sends it to Cincinnati on the Ohio wire. I pose the question, when does this news become a separate and distinct commodity? At Cairo, Egypt? Or was it converted to singularity at Columbus, Ohio? If so, should a charge for the service be limited to some portion of the salary of the AP man at Columbus and the cost of the electronic channel between Columbus and Cincinnati? But who then is to pay for the services of the people who gathered and sent out the news from Cairo, and who is to pay for its handling in New York and how will these costs be apportioned? How will Cincinnati be separately assessed for a part of Cairo's costs for the rare day on which an event in Egypt has some special interest in Cincinnati?

Reference has been made to the claimed fact that United Press furnishes one or more wires for separate prices. The evidence on this is quite unclear. The United Press, unlike AP, is a corporation for profit, not a mutual association. The only evidence exhibiting a definite arrangement between a newspaper and United Press was its 1955 contract with Times-Star. This was quite similar to the AP contract and called for delivery of UP's "regular Day Trunk, Ohio State and Sports Report" for an unsegregated charge of "$600 per week during the first four years; $1,000 per week during the fifth year, and $1,300 per week thereafter."

My conclusion that AP's basic arrangement is reasonable in its basic nature can be further supported by attempting to fit the present case into the terms of conventional tying analysis, a task to which I now turn.

Appendix A

1) *Separability.*

The tying arrangements first considered to violate the Sherman Act were those where a patentee sought to extend his patent monopoly by refusing to sell the product of his patent without an unpatented item. International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947). As the law has developed, however, the tying product need not have patent monopoly to condemn its use to control other tied products. Northern Pac. R. Co. v. United States, 356 U. S. 1, 9, 78 S. Ct. 514 (1958). But to establish such illegality, it is essential that the tied and the tying products be *separable* and *different*. "For our purposes a tying arrangement may be defined as an agreement by a party to sell *one product* but only on the condition that the buyer also purchases a *different* (or tied product. * * *" Northern Pac. Ry. Co. v. United States, supra, 356 U. S. 5, 78 S. Ct. at 518. (Emphasis supplied.) The defendant-appellant, relying on a charge of illegality to avoid liability for breach of its contract, had the burden of proving such illegality. Palmer v. Chamberlin, 191 F. 2d 532 (CA 5, 1951); Illinois Surety Co. v. O'Brien, 223 F. 933 (CA 6, 1915). Whether the news items of all kinds that were of especial interest to Ohio readers were different products than the general news items of all kinds which were also of interest to the readers of the Cincinnati Times-Star was a *question of fact*. The District Judge found that defendant-appellant had failed to meet its burden of proving *as a matter of fact* the separability necessary to taint the contract with illegality. Recognizing that such ruling was a finding of fact, my brothers, in reversing the District Judge, conclude as required by Rule 52(a) F. R. C. Proc. that such finding was clearly erroneous. I cannot avoid the con-

clusion that the District Judge's holding that appellant had failed to prove such essential fact was not only not clearly erroneous, but was in my view clearly correct.

In support of my view, I recite what I believe is a fair summary of the evidence from which the essential facts had to be found. It was from the awareness of its charter members that acquisition and publication of news could better be accomplished through mutual efforts that the Associated Press had its beginnings in 1900. The record does not clearly disclose just what methods and instruments were initially employed to reciprocally exchange news for publication. The morse code was early used and we may assume that telegraph was the customary means. With the developments that followed telegraph, telephone and wireless came into use. The information making up the news is actually conveyed by instrumentalities provided by the American Telephone & Telegraph and the Western Union. The word "wire" came to be used to identify what was referred to in the testimony as an electronic channel, not necessarily a physical wire. *It is clear that the use of the several so-called "wires" did not at all come about as an effort by a manufacturer of several products to increase control of a market by tying one product to another.* To the contrary, the use of several channels came about as the volume of the news increased and it was found inefficient to carry all the news on one channel. With several channels available, each was devoted primarily to one general type of news—top national and international news on A, financial or business news on D, and local interest news on S (Ohio Big Cities in the present case, although we may assume that a similar S wire was provided for other regions as well). Notwithstanding this general classification, the evidence showed that news items outside of the respective

classification were, consistent with varying load problems, carried on each of the wires. The reason for this is illustrated by the starting of the D wire about 1934. Up to then the financial and business news was sent over the A wire and a parallel wire called B, but it was found that these facilities were not adequate to expeditiously deliver the financial and business news with the other general news and at the request and with the consent of the AP members, a D wire was established to pick up the financial news separately between 10:00 A.M. and 6:00 P.M. and get it out promptly to the members. During and prior to the times here involved, however, there was no D wire distributing financial and business news to members west of Kansas City. Such news was, and apparently continues to be, carried on the A wire and a so-called B wire, neither of which carry the financial news separately. It was shown also that the use of three wires was limited to the metropolitan dailies and that a condensation of all of the news on the A, B, D and S wires went on a single circuit to smaller city papers that did not need the same volume as the metropolitan papers. The function of the B wire is not entirely clear from the evidence, although it seems to have been a wire parallel to the A wire and also to have been used for direct exchange of news between the AP members. There was evidence that out of the general news coming into an AP bureau at Columbus on the B wire, the chief of that bureau, on his evaluation, would take out dispatches of special news interest to the Ohio papers and run them on the S or Ohio Big Cities wire. There was much evidence of overlapping on all wires and each at times, according to the general load carried news unrelated to its general classification or news that partook of several clas-

sifications.[3] The following footnote recitation in the District Judge's opinion partially covers the evidence.

> "The term 'trunk' as used in this opinion, designates mechanical reproduction of news print. The actual transmission may be carried by wire or by wireless. The news gathered by the Associated Press is transmitted to all members by means of leased wire circuits and electronic facilities. The technical method by which the news is transmitted has no bearing on the legal conclusion herein.
>
> "News originating in the United States is not transmitted to a single control point for transmission, but is transmitted to the members of The Associated Press directly from the news bureau of The Associated Press in the area in which the news originates. News originating abroad is transmitted to the offices of The Associated Press in New York from which it is transmitted to all points in the United States. Newspapers in metropolitan cities require a greater volume of news than newspapers in small cities. The leased wire news service furnished by The Associated Press to newspapers in small cities is transmitted over a single circuit. The leased wire news service furnished by The Associated Press to newspapers in metropolitan cities is transmitted over multiple circuits. *These multiple circuits, commonly called trunks, have come into existence because, under*

[3]The majority opinion quotes from a stipulation describing the news classifications carried over the respective wires. Immediately following the quoted portion, the stipulation provides, "Additional evidence about these circuits and about the AP's leased wire news service to its members will be presented at the trial." The District Judge made his decision from the entire record.

present technology, it is impossible to transmit all state, national, and international news on one circuit. As previously mentioned, the leased wire news service furnished by The Associated Press to newspapers in metropolitan cities east of the Mississippi River and north of the Mason-Dixon line is transmitted to such newspapers over circuits designated as A, D, and S trunks. The A circuit operates 24 hours a day and carries news of top national and international importance. The D circuit operates from 10 a.m. to 6 p. m., New York time, Monday through Saturday, and carries financial and business news, market quotations and general news which cannot be accommodated on the A circuit. The S circuit is a regional circuit. In Ohio, the S circuit is known as the Ohio Big Cities wire and carries news of regional interest in Ohio and general news originating elsewhere that cannot be accommodated on the A circuit. The B circuit parallels the A circuit from New York to Kansas City and supplements the A circuit. General news of interest in Ohio is taken from the B circuit at Columbus and relayed to newspapers in Ohio on the S circuit, or Ohio Big Cities wire. At Cincinnati, the B circuit is used exclusively for the transmission of news out of Cincinnati.

"In the years 1934 and 1935, the volume of news transmitted to afternoon newspapers in metropolitan cities became so great, the A and B circuits were inadequate. The Associated Press sought the views of the members affected as to whether a new facility should be established. With the assent of all members affected, the D wire facility was established.

Appendix A

> Commencing in 1935, the news which was theretofore transmitted to the Cincinnati Times-Star over the B circuit was transmitted over the D circuit." (Emphasis supplied.)

The evidence offered small help in measuring and separating into identifiable compartments AP's vast total functions of world-wide news gathering and distribution. It impresses me that the intricacies and complexities involved may make it impossible to offer any evidence for reliably dividing into separate and distinct products or articles the incorporeal thing called news. There was no evidence which would permit easy separation into neat divisions of the *gathering* of information of the infinite variety of events that go to make up the news. I agree with my brothers that the fact that the Associated Press did not, and in my view likely could not, allocate to each one of its wire facilities a defined share of its total costs does not by itself foreclose a finding of illegal conduct. However, the obvious difficulty and perhaps impossibility of making any such cost division that would be reliable is, I believe, relevant to and supportive of the District Judge's finding of fact that appellant failed to prove its case of separability and distinctness. To be sure, the District Judge emphasized that appellant had "failed to provide this court with sufficient facts upon which it may be concluded that there is a natural division in the cost of gathering news transmitted over the A, D and State trunks," and further said "without such a complete division, it is unnecessary and futile to explore the other elements of the alleged tying agreement." He also said, however, "Recognition must be made that the compulsory joining of two separate and distinct things is a fundamental prerequisite of an illegal tie sale situation. * * *

Defendant has not presented sufficient evidence of separability." I read his whole opinion as a finding that appellant's proofs did not establish as a matter of fact that AP's several wire services—electronic channels—were separate and distinct products.

It seems to me that it would require excessive subtlety and subjective evaluation to break down into various components the tangled skein of human events called news so as to be able to say, as a fact, that information as to certain events separated by time or physical distance or by the degree of interest it excites in one place and not in another, or by the different persons whose conduct make up the newsworthy events, can be divided so as to be identified as distinct and separate products. Is the knowledge of each of the myriad events that make up the news a separate product, or are separate products to be identified by the means chosen for transmission? Much speculation can be indulged in coming to a factual answer to the involved question of separability. I cannot convince myself that news of the death of the governor of Ohio is a different product than news of the death of the governor of Illinois, any more than news of the resignation of the Mayor of Cincinnati is a different product than news of the resignation of the Mayor of Cleveland or of Dayton, Ohio. I do not think that like products can be made unlike by the vehicles chosen for their delivery to the user. The fact that the AP made some broad classifications of its total news so as to deliver it more speedily and efficiently does not in my view immediately convert these classifications into separate and distinct products. Small newspapers received the news of all kinds over one wire. Could one of these newspapers, having a contract to receive such news for a given price and for a fixed period, demand that AP fix a separate

price for the society news and being denied, refuse performance of its contract? It seems to me that material to the factual question involved is that all of the members of the AP have at all times agreed to share by way of assessments the cost of getting the "leased wire news service of The Associated Press." That was the subject matter of appellant's contract with AP and such contract made no breakdown of such service into different kinds of news. There is no showing in the record that prior to appellant's request in 1957, any publisher of any metropolitan newspaper or anyone else ever requested delivery of anything less than what was the "wire news service of the Associated Press" even though, as the system developed, separate electronic channels were employed to deliver two classifications out of the whole for more speedy and efficient delivery. Each metropolitan paper used all of this news and it was testified that all of it was essential to the publishing of such a paper. These circumstances bespeak a recognition of the lack of separability of the news provided by AP and should be weighed upon the factual issue of separability.

I am not convinced that the fact that AP offered to the E. W. Scripps Company to eliminate the so-called Kentucky wire and reduce the total assessment by some $240.00 proves the separability of the A, D and S wires. The record is clear that the latter were always considered as together making up the AP's basic service. It appears that the so-called Kentucky wire was furnished under a separate contract made on the same day as the contract in suit, August 4, 1948, and it was between AP and the Cincinnati Times-Star Company *of Covington, Kentucky.* The contract in suit was between AP and the Cincinnati Times-Star Company of *Cincinnati, Ohio.* The record is unclear as to the

reason for this and in any event does not permit us to give significance to the offer made to the Scripps people to furnish the basic service for Cincinnati without any assessment for a Kentucky wire. The proposal to drop this service for the combined paper proves no more in the present context than the undoubted fact that metropolitan newspapers which do not receive the Kentucky wire may be found all over the country. No comparison was offered to show that the operations of the combined paper were such that the Kentucky service should be included in its assessment for whatever reasons made it fair to assess Times-Star but not a New York newspaper for its costs. Thus this incident illustrates only one application of AP's assessment formula, geared to estimated needs and benefits, and leaves the record entirely devoid of any attempt to prove the slightest connection between the proposed reduction and the cost of providing the Kentucky wire.

In Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 614, 73 S. Ct. 872, 883, 97 L. Ed. 1277, 1293 (1953), the Supreme Court said:

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a *second distinct commodity* with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." (Emphasis supplied.)

In Northern Pac. Ry. v. United States, 356 U. S. 1, 5, 78 S. Ct. 514, 518, the Court said:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product *but only on the condition* that the buyer also pur-

chases *a different* (or tied) *product.* * * *" (Emphasis supplied.)

In the cases which have developed the rule declaring tying arrangements illegal under the Sherman and Clayton Act, the tying products usually have had physical and corporeal existence distinct and different from the so-called tied products. E.g., International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947); Northern Pac. Ry. v. United States, supra. In the block booking cases, the tying products were separate and distinct products, moving pictures, each complete in itself, each "in itself a unique product," having physical being and usable alone without aid or supplementation by any other moving picture films, the tied products. United States v. Loew's, Inc., 371 U. S. 38, 47-48, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962).

I think it appropriate to emphasize here that this Court is not at liberty to make findings of fact or to draw final inferences of fact simply upon its own evaluation of the evidence. Commissioner v. Duberstein, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1959). Conceding that the issue of separability is one of fact, and being aware of this restriction, my brothers find clearly erroneous the District Judge's factfinding. Rule 52(a).

In none of the cases relied upon by the majority has an appellate court set aside as clearly erroneous a District Court's finding of fact. United States v. Loew's, Inc., 371 U. S. 38, 83 S. Ct. 97 (1962); Northern Pac. R. R. Co. v. United States, 356 U. S. 1, 78 S. Ct. 514 (1958); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E. D. Pa. 1960), aff'd per curiam, 365 U. S. 567, 81, S. Ct. 755, 5 L. Ed. 2d 806 (1961). In each of these cases it was the District Judge who made the finding of fact—the appellate

court sustained such finding. And American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848 (S. D. N. Y. 1963), also relied upon by the majority, involves no evidentiary findings of fact whatever, for the court was concerned only with a motion to dismiss the complaint I am unaware of any case where an appellate court has found clearly erroneous a finding of fact involving such nuances of meaning and such delicate appraisal and balancing as were involved in determining whether each news "wire" represented a "separate and distinct product."

2) *Illegality as defense to breach of contract.*

It should be kept in mind that the contract sued upon did not by its terms or by its negotiation involve any compulsion. Except for possible inferences to be drawn from the recitals in the Minutes of a single AP Board meeting,[4] there is no showing that prior to the Times-Star effort in 1957 either Times-Star or any other AP member actually requested that AP provide anything less than its "leased wire service" which Times-Star contracted to take in its contract of 1948. On the contrary, explanation of the impracticability of separation satisfied any inquiry on the

[4]"Mr. Cooper advised the Board that four members served on the Pacific Northwest trunk circuit desired to discontinue the wire facilities for the financial tabular service and that three members opposed such discontinuance.

"W. H. Cowles stated that the Spokesman-Review and Spokane Daily Chronicle would consent to discontinuance of the tabular wire, if all members concerned came to an agreement to substitute therefor a reduced stock market report to be carried on the regular Associated Press news wire.

"The Board voted that inasmuch as the tabular service had always been an integral part of the basic news report, which should not be permitted to disintegrate and inasmuch as assessment reductions had been given for the local element where requested for discontinuance, the present arrangements be continued until the members concerned unanimously agreed otherwise." (Apparently about 1943.)

subject.[5] Apparently, no member of AP considered that what it was getting through its contract and membership was made up of distinct products which might be separately desired or used. The whole enterprise was a mutual plan. No reading of the standard AP contract and its by-laws will exhibit an exposed or hidden plan that any separable part of its service was to be provided *on the condition* that some other part be accepted and paid for. There is no hint of "a forced purchase of a second distinct commodity," Times-Picayune Publishing Co. v. United States, supra, or the sale of one product "Only on the condition that the buyer also purchases a different * * * product," Northern Pac. Ry. Co. v. United States, supra. The contract sued upon and its negotiation were entirely free of any element of compulsion,[6] and there is nothing in the entire record of this case to suggest that the multiplication of AP's channels for distributing the news reflects "the use of economic power in one market to restrict competition on the merits in another * * *" condemned by the Court in Northern Pacific as "the vice of tying arrangements." 356 U. S. 11, 78 S. Ct. 514 (Emphasis supplied.) Even in September of 1957, Times-Star's first request was not to get the Ohio Big Cities wire for a separate price, but merely to get a reduction in its assessment for receiving the *total* AP service.[7] This, of course, could only be accomplished by dis-

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[5]An AP executive testified that "* * * over the years it has been discussed and after an explanation of the impracticability of attempting to deliver a news report on one of several trunk wires, there has not been, to my knowledge, a request for one."

[6]Times-Star's position in this regard is emphasized by the following colloquy between the District Judge and Times-Star's counsel:

Court: "* * * there was absolutely no evidence whatever that there was—that it [the contract] was entered into under a complaint."

Counsel: "We don't have to show that, I want that understood, that is basic."

[7]As far as this record discloses, a contention that AP's plan of operation was an illegal tying arrangement made its first appearance in Times-Star's pleadings after it was sued for breach of contract.

criminating against all members of AP by having them assume part of Times-Star's assessment. Only when this was refused did Times-Star seek to have AP deliver the news coming over the Ohio wire alone. I find it difficult to understand how a contract without taint when made can be converted to complete illegality during its term by a request for total or partial release from its valid obligations. I respectfully assert that while the facts involved were not identical with those in the case at bar the Supreme Court's decision in Kelly v. Kosuga, 358 U. S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959), supports my view in this regard. With its preliminary observation that "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court," 358 U. S. 518, 79 S. Ct. 431, the Court held that a purchaser who had been receiving the fruits of a contract could not thereafter refuse to fulfill it. In that case Kelly had agreed to purchase 50 cars of onions under a contract which he claimed to have an illegal purpose to fix and control the price of onions. Kelly accepted delivery of 13 cars but refused to take the balance. The seller sued for damages accruing from Kelly's nonperformance of his unfulfilled promises. It is significant that Kelly *had not received or used* the onions which were the subject of the suit. The Supreme Court affirmed the Seventh Circuit decision which had sustained the action of the District Court in striking the pleaded defense of illegality. Kosuga v. Kelly, 257 F. 2d 48 (CA 7, 1958). The Supreme Court said:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument

> suggests, it must be said that his theory creates a very strange class of private attorneys general." 358 U. S. 520, 79 S. Ct. 431.

I would like further to cite here what the Supreme Court in Kelly v. Kosuga quoted with approval from McMullen v. Hoffman, 174 U. S. 639, 669, 19 S. Ct. 839, 851, 43 L. Ed. 1117, 1129 (1889).

> "It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations, and in order the better to secure the public against dishonest transactions."

The action against Kelly was not for the price of onions which he had received and used, but was for damages for failure to take the undelivered portion of the total agreed to be purchased. In the case at bar Times-Star had, under its contract of August 4, 1948, received all of the services covered by the contract up to July of 1958. It had agreed to continue to receive and pay for these services until it terminated its contract by a two-year notice. The action here is to recover the loss resulting to AP from Times-Star's refusal to receive and pay for their news service during the two years following notice of termination. To enforce such a contract against a willing buyer who freely entered into it without questioning whether a lesser contract could be made seems here, even more than in Kelly v. Kosuga, to be but to enforce "a lawful sale for a fair consideration [which] constitutes an intelligible economic transaction in itself. * * *' 358 U. S. 521, 79 S. Ct. 432.

Appendix A

With respect, I state my belief that the majority have misconstrued a basic issue when they characterize the AP practice as "this AP policy and practice of 'tying' four wire services together in a single 'package' and *requiring* that appellant take and pay for four wire services in order to receive one of them. * * *" There is no evidence that Times-Star even suggested, let alone requested, that it be permitted to take anything different from, or less than, AP's entire basic news service during all the years it continued as a member of AP, much less in 1948 when it entered into the contract sued upon. Even when beset by financial difficulties, the record makes it clear that Times-Star's first thought was to get a reduced assessment for the entire AP basic service, and that reduction of service was sought only after it was made clear no lower assessment could be had. In several places my brothers characterize AP's activities as requiring Times-Star *"to continue to subscribe* and pay for three wires which appellant did not want and need." (Emphasis supplied.) On the contrary, AP merely insisted that Times-Star perform its contract made at a time in 1948 when Times-Star obviously did want and need the AP basic news service. AP did not, in 1957, require Times-Star to "continue to subscribe" for the wires it then decided it would prefer not to take. Times-Star had already subscribed for this service and had received all of the consideration due under its contract. AP merely refused to consent to its breach—no reason appears in the record why Times-Star could not then have given the required two years' notice.

The majority places reliance on United States v. Loew's, Inc., 371 U. S. 38, 83 S. Ct. 97 (1962). May I point out that Loew's as well as Northern Pacific Railway Co. v.

United States, 356 U. S. 1, 78 S. Ct. 514, and United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E. D. Pa. 1960), aff'd per curiam 365 U. S. 567, 81 S. Ct. 755 (1961), also relied on, were cases involving government action to enjoin practices or contracts requiring that a "distinct commodity" be taken *as a condition* to obtaining the more desired "tying" product. Indeed, in United States v. Paramount Pictures, Inc., 334 U. S. 131, 159, 68 S. Ct. 915, 930, 92 L. Ed. 1260, 1293 (1948), the Supreme Court said,

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."

None of these cases involved breach of contract actions and I think that Mr. Justice Brennan's opinion in Kelly v. Kosuga, supra, makes clear the distinction that should be made here. My brothers, asserting that even though voluntarily made, the AP-Times-Star 1948 contract will not save the plaintiff's judgment here, quote from Loew's that "the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by *contractual obligations*. * * * *Contractual obligations* cannot thus supersede statutory imperatives." 371 U. S. 51, 83 S. Ct. at 105. (Emphasis supplied.) The quoted language is misapplied. The "contractual obligations" there being discussed did not at all relate to a contract between a supplier and a purchaser, as AP and Times-Star, but involved instead a supplier's claim that its "contractual obligations" *to a*

third party required it to enter into the tying arrangement under attack by the government.

It impresses me that if there is now a question whether the Associated Press has by its practices become a danger to the free competition sought to be protected by the anti-trust laws, the question would better be resolved by Congressional action or by a frontal attack by the Department of Justice. I find no illegality in the contract before us and thus cannot join in permitting appellant to employ the anti-trust laws to escape obligations voluntarily assumed in a contract which, when made, expressed the bargain it then desired for itself.

I pose the question whether under the majority opinion any member of the Associated Press can legally repudiate its obligations by making and being refused a demand that henceforth it be supplied only, and separately, with the society news, or foreign news, or political news, or news of the British Commonwealth or the European Common Market. If AP's present practices were indeed illegal tying schemes, and in my view they are not, such a rearrangement of the entire Associated Press method of gathering and distributing the news and assessing its costs will be necessary. But I find it difficult to understand why there should be added the chaos of a transition period where none of the present contractual arrangements can be relied upon. If the manufacturer of Chevrolet automobiles had a contract to sell ten of its Chevrolets per month for a stated period to a purchaser, could the purchaser convert the contract into an illegal tying arrangement by demanding that for the balance of the contract term it be allowed to purchase only the steering mechanism for a separate price so as to use the latter in assembled automobiles designed

by the purchaser? I doubt it, even though the steering mechanism is manufactured in a separate facility and easily deliverable by itself.

The majority opinion affirms the District Judge's dismissal of appellant's counterclaim for damages under the anti-trust laws because the proofs of damages were too speculative for an award thereof. My above views quite obviously put me in agreement with the majority on the disposition of this issue.

3) *Other contract defenses.*

Because of its holding that illegality bars plaintiff's recovery, the majority opinion did not deal with other defenses asserted by appellant. These included claims that under its contract and the by-laws of the Associated Press appellant's liability ceased when it was no longer publisher of the Cincinnati Times-Star and that plaintiff AP had suffered no recoverable damages by appellant's conduct.

a) *Discontinuance of publication.* The Cincinnati Times-Star continued as a daily newspaper after its assets were transferred to E. W. Scripps Company, owners of the Cincinnati Post, in a daily paper called the Cincinnati Post and Times-Star. The contract in question provided that it would continue in force "until terminated by the Member upon two years' notice, in writing, by registered mail to the Associated Press of the Member's election to do so." The contract also provided that "The provisions hereof and the By-laws of The Associated Press constitute the whole agreement between the parties hereto." A by-law provided,

> "Sec. 13. In case (a) a regular member shall cease to be the owner of the newspaper described in his or

> its contract with the Corporation, or (b) a newspaper represented by regular membership shall cease regular publication, the membership shall automatically, and without action by the Corporation, become an associate membership."

The quoted by-law does not provide, nor was there any evidence, that becoming an "associate membership" terminated the contract or excused the giving of the two year notice of termination. There was a further provision of the contract that

> "Upon the sale or transfer of the business of the Member to which this agreement relates, the Member shall cause the Member's successor to agree in writing to fulfill the terms and conditions of this agreement during the term hereof and to apply for membership in the Associated Press in the same class as the Member."

The Times-Star did neither of the acts which would have terminated its liability—giving notice or having a successor assume its liability—and clearly breached its contract. It offered evidence, objection to some of which was sustained, to show various instances where the Associated Press had not enforced the two year notice provision against members who had gone out of business. The circumstances of these cases were not shown to have been the same as the transaction whereby the Times-Star paper was sold to Scripps for $3,710,000. But in any event forbearance from enforcing its contract with others did not foreclose AP's insistence on its contract rights against appellant.

b) *Recoverable damages.* Appellant urged that AP failed to prove its damages. It is not disputed that when Times-Star discontinued payment of its weekly assessments such revenue was lost to AP. Appellant offered evidence that during the two year period involved AP obtained new revenue in excess of the total assessments payable by Times-Star during such period by increasing its membership through the additions of radio stations and other media. Such additional revenue, however, did not take the place of the loss accruing from appellant's refusal to pay. The evidence also showed that during the entire period involved AP had a deficit and that not withstanding revenue from new members it had a net operating deficit in the approximate sum of $600,000. The District Judge spoke on this subject as follows:

> "Under the by-laws of Plaintiff, it can recoup losses of revenue from other members in The Association by use of its assessment formula. First, an actual loss is sustained by Plaintiff when a newspaper discontinues its news services without paying its contractual obligations. The Plaintiff corporation, being a non-profit corporation, then finds it necessary to meet its expenses through an increased assessment of the membership. Whatever losses the corporation incurs for any reasons must be assessed to the membership. The members, through the increased assessment, do not eliminate the loss, they only subsidize the corporation. Thus Plaintiff sustained a real loss when Defendant cancelled the contract."

I consider that the Associated Press' method of obtaining needed revenue by a formula for assessing its members

is not unlike a utility's recovery of its costs by spreading rates among the users of its power. In City of Memphis for and on Behalf of Memphis Light, Gas and Water Division v. Ford Motor Co., 304 F. 2d 845 (CA 6, 1962) we held that the minimum monthly rate that Ford Motor had agreed to pay for a fixed period was recoverable in full upon Ford's breach of contract, even though the Memphis utility was not required thereafter to generate and deliver the power contracted for by Ford.

I would affirm the judgment of the District Court.

APPENDIX B

Memorandum Opinion of the District Court

(April 5, 1963)

BATTISTI, J.:

This civil action arose as a simple contract dispute between residents of different states. The Plaintiff, The Associated Press (hereinafter referred to as Plaintiff), entered suit against the Defendant, Taft-Ingalls Corporation (hereinafter referred to as Defendant), for damages arising from an alleged breach of contract. Defendant has admitted most of the essential fact allegations, but denies that Plaintiff is entitled to damages in whole or in part. The denial is based upon six affirmative defenses.

The first defense denies any damages. The second defense alleges a prior termination or novation of the contract. The third defense states that Plaintiff's remedies are limited to those outlined in the Articles and By-laws of the Association. Defendant's next three defenses are based upon claimed violations of the Clayton and Sherman Acts,* which would minimize or eliminate any damages.

In addition to the denial of liability, Defendant brings a counter-claim against Plaintiff charging, in substance, that it has been injured by Plaintiff's violations of the Clayton and Sherman Acts and that it is entitled to damages against Plaintiff.

The Plaintiff is a non-profit membership New York Corporation. It is a mutual and cooperative association formed to gather and report news in an economical, efficient, accurate and impartial manner. The Corporation gathers, obtains and procures news through its own instru-

*Title 15, U. S. C. Sections 1, 2, 14 & 15.

mentalities by exchange with its members and others, and by other appropriate means. The news thus gathered is furnished and supplied to members and others entitled to the use of such news in accordance with regulations, by-laws and contracts.

Defendant is an Ohio corporation which was known as The Cincinnati Times-Star Company at the time of the occurrences which gave rise to this controversy. It later changed its name to Taft-Ingalls Corporation.

The Court finds that the following are the facts which control the ultimate disposal of this controversy. In 1948, the Plaintiff and Defendant entered into a contract. The contract provided that "It shall continue . . . until terminated by the member upon two years' notice, in writing, by registered mail"* and further provided that "Upon the sale or transfer of the business of the member to which this agreement relates, the member shall cause the member's successor to agree in writing to fulfill the terms and conditions of this agreement during the term hereof and to apply for membership in The Associated Press in the same class as the member."** Plaintiff offers two types of membership—regular and associate. For purposes of this opinion, it is unnecessary to distinguish the privileges and responsibilities of the types of membership, but it is significant to note that the Defendant was a regular member of The Associated Press. Each member of the Corporation is required to enter into a contract with the Corporation, which contract is similar to that which existed between Plaintiff and Defendant. The obligations and liabilities of members are then determined by both the by-laws and the

*Article 4 of the Agreement between Plaintiff and Defendant.
**Article 9 of the Agreement between Plaintiff and Defendant.

contract. There is no conflict between them as they supplement each other.

Article 7, Section 6 of the Corporation by-laws permits the Board of Directors to determine the nature and extent of the news service which is furnished to each member. In practical application the Board of Directors has divided the areas served by the Corporation into large geographical regions. Each region receives two or more circuits, depending upon the volume of news. The region east of the Mississippi and north of the Mason-Dixon Line (in which the Cincinnati Times-Star was located) was serviced by a general news circuit known as the "A" trunk, State trunk, and a financial trunk known as the "D" trunk. News on the State trunk originated, in part, from a circuit known as the "B" trunk, which transmits to certain cities in each state. The "B" trunk does not connect directly to Cincinnati.*

In June, 1954, the Times-Star Company transferred ownership and publication of "The Cincinnati Times-Star" newspaper to The Cincinnati Publishing Company, a sub-

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*The term "trunk," as used in this opinion, designates mechanical reproductions of news print. The actual transmission may be carried by wire or by wireless. The news gathered by The Associated Press is transmitted to all members by means of leased wire circuits and electronic facilities. The technical method by which the news is transmitted has no bearing on the legal conclusions herein.

News originating in the United States is not transmitted to a single control point for transmission, but is transmitted to the members of The Associated Press directly from the news bureau of The Associated Press in the area in which the news originates. News originating abroad is transmitted to the offices of The Associated Press in New York from which it is transmitted to all points in the United States. Newspapers in metropolitan cities require a greater volume of news than newspapers in small cities. The leased wire news service furnished by The Associated Press to newspapers in small cities is transmitted over a single circuit. The leased wire news

sidiary of the Times-Star Company. Plaintiff continued to transmit news to the newspaper, and the Publishing Company paid the normal assessment. The same person represented the newspaper with Plaintiff.

Notice, in writing, by registered mail, as required by the contract, was not given at this time to Plaintiff by the Defendant.

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service furnished by The Associated Press to newspapers in metropolitan cities is transmitted over multiple circuits. These multiple circuits, commonly called trunks, have come into existence because, under present technology, it is impossible to transmit all state, national, and international news on one circuit. As previously mentioned, the leased wire news service furnished by The Associated Press to newspapers in metropolitan cities east of the Mississippi River and north of the Mason-Dixon Line is transmitted to such newspapers over circuits designated as A, D, and S trunks. The A circuit operates 24 hours a day and carries news of top national and international importance. The D circuit operates from 10 a. m. to 6 p. m., New York time, Monday through Saturday, and carries financial and business news, market quotations and general news which cannot be accommodated on the A circuit. The S circuit is a regional circuit. In Ohio, the S circuit is known as the Ohio Big Cities wire and carries news of regional interest in Ohio and general news originating elsewhere that cannot be accommodated on the A circuit. The B circuit parallels the A circuit from New York to Kansas City and supplements the A circuit. General news of interest in Ohio is taken from the B circuit at Columbus and relayed to newspapers in Ohio on the S circuit, or Ohio Big Cities wire. At Cincinnati, The B circuit is used exclusively for the transmission of news out of Cincinnati.

In the years 1934 and 1935, the volume of news transmitted to afternoon newspapers in metropolitan cities became so great, the A and B circuits were inadequate. The Associated Press sought the views of the members affected as to whether a new facility should be established. With the assent of all members affected, the D wire facility was established. Commencing in 1935, the news which was theretofore transmitted to the Cincinnati Times-Star over the B circuit was transmitted over the D circuit.

The existence of several lines of communication form the basis of Defendant's anti-trust assertions. However, an essential question—whether separability within the realm of anti-trust violation exists—is discussed later in this opinion.

Appendix B

It is possible that Plaintiff was aware of the new corporation by virtue of oral conversation, the masthead of the newspaper and other media. On the other hand, Plaintiff had no cause to deal with the new corporation because Defendant continued to act as member of The Associated Press. Defendant appeared as no less than a principal.*

At no time was the Plaintiff's contract with Defendant assigned to the Publishing Company or formally acknowledged by the Publishing Company. Nor was there a novation within the requirements of Ohio law.** On July 19, 1958, Defendant and the Cincinnati Publishing Company entered into a contract with the E. W. Scripps Company covering assets of the Cincinnati Publishing Company. The next day Plaintiff received a wire from the Cincinnati Publishing Company informing it of the sale of the Times-Star to the E. W. Scripps Company requesting a cancellation of all services under the contract with Plaintiff.

The E. W. Scripps Company declined to accept the same basic news service which had heretofore been provided to Defendant. It published a newspaper called the Cincinnati Post and Times-Star from the location where the Cincinnati Times had previously been published and offered to take part of the service formerly rendered to the Times-Star. It would not, as stated, take the basic or minimum package. Plaintiff declined to furnish its service piecemeal.

Subsequent to the cancellation by Defendant of Plaintiff's services, Plaintiff stopped its transmission of news into the Cincinnati area.

The Cincinnati Publishing Company was dissolved after the sale. All remaining assets and liabilities passed to the Defendant as a part of the liquidation.

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*Defendant's (sic) continued to name Mr. Ingalls as its representative to the Plaintiff's shareholder meetings.

***Grant-Holub Co.* v. *Goodman,* 23 Ohio App. 540 (1926).

Appendix B

The contract which Plaintiff and Defendant signed in 1948 requires the Defendant to give two years' notice of its intention to terminate said contract. No such notice was ever given.

On the basis of the facts stated above, the Court concludes that the contract of August 4, 1948, between Plaintiff and Defendant is a valid and enforceable contract according to the terms thereof, and the contract in no way conflicts with Plaintiff's by-laws.

No valid assignment of the contract from Defendant to its subsidiary, Cincinnati Publishing Company, ever took place. Plaintiff was never presented with a consent from the Cincinnati Publishing Company to abide by the terms and conditions of the contract. Thus during the period of time in which the Publishing Company was in existence, it was an agent of the Defendant; and, further, at its liquidation, the Defendant became the recipient of its assets. Both as the principle (sic) and as the recipient of assets, Defendant is liable to Plaintiff under the terms of the contract which Defendant entered into with Plaintiff.

It would be inequitable to permit the Defendant to transfer its assets to a wholly-owned subsidiary corporation and then permit it to use that corporation as a shield to avoid the obligations which it has incurred. Although courts have always recognized the limitations of liability authorized by the granting of a corporate charter, they are not reluctant to pierce the corporate veil when justice dictates. The facts of this case are not such as to require a technical piercing of the corporate veil. The Defendant in this action signed the contract upon which Plaintiff seeks his just remedy. Defendant never assigned that contract to its subsidiary, and did not seek, nor receive, a novation of the contract. The Court, therefore, must conclude

that Defendant is fully liable under the obligations of the contract.

The Court finds that on or about July 26, 1958, Defendant breached its contract with Plaintiff by failing and refusing to publish news furnished by Plaintiff, and by failing and refusing to pay the weekly assessments in accordance with the terms of the contract.

The allegations of violations of the anti-trust laws place the initial burden of proof on the party making the allegation. While the Plaintiff has done little more than deny that a violation exists; nevertheless, Defendant, who carries the primary responsibility of proof, has presented little more than the basic allegations. Sufficient information which could establish or refute the existence of Sherman Act and Clayton Act violations was ascertainable through the proper use of the discovery processes in the federal court. It was, therefore, incumbent upon the Defendant, as the moving party, to establish a prima facie violation, otherwise the Defendant cannot succeed.

In order to establish the anti-trust defenses or the counter-claim based on illegal tying agreements, Defendant had the burden of showing that Plaintiff was engaged in illegal activity. A violation of either the Sherman Act or the Clayton Anti-Trust Act would depend upon a showing that The Associated Press is engaging in an activity which appears to stifle competition by combining separate articles. Defendant's evidence consists substantially of a showing of separate circuits for the transmission of news and the testimony of an expert accountant that under good accounting practices, different cost allocations could be used. Defendant has failed to provide this Court with sufficient facts upon which it may be concluded that there

is a natural division in the cost of gathering news transmitted over the A, D, and State trunks. Without such a complete division, it is unnecessary and futile to explore the other elements of the alleged tying agreement. Recognition must be made that the compulsory joining of two separate and distinct things is a fundamental prerequisite of an illegal tie sale situation. It was said in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653, 655 (C. A. 1, 1961), *cert. den.*, 368 U. S. 931 (1961):

> "We may agree with (defendant) that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing . . . we must first consider what may be fairly treated by the seller as inseparable."

Defendant has not presented sufficient evidence of separability. The other requirements of a violation were set out in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 614 (1953):

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product resulting in economic harm to competition or the 'tied' market."

Defendant has also failed to present sufficient evidence of "force," "dominant product" or "resulting economic harm." On the paucity of facts, in this connection, the Defendant cannot prevail.

The Sherman Act's interpretation has broadened considerably since the early tie sales cases which involved products tied to patent products. It is entirely possible that

the Plaintiff's method of dispensing its news is in violation of the Sherman Act. The questions herein presented were not decided in *Associated Press* v. *United States,* 326 U. S. 1 (1945), nor in any of the other cases which counsel cite to this Court. Unfortunately, they cannot be definitely decided in this opinion.

The sixth defense alleges that the Plaintiff has violated the Sherman Act because the contract imposes an obligation on members to furnish dispatches on local news to the Plaintiff. The contract does not require exclusiveness. The evidence does not show any injury to competition. The defense cannot, therefor, succeed.

The requirement that the recipient of the news service continues to pay for such service whether or not the recipient is making any use of that service is not a violation of the Sherman Act.*

Under the by-laws of Plaintiff, it can recoup losses of revenue from other members in The Association by use of its assessment formula. First, an actual loss is sustained by Plaintiff when a newspaper discontinues its news services without paying its contractual obligations. The Plaintiff corporation, being a non-profit corporation, then finds it necessary to meet its expenses through an increased assessment of the membership. Whatever losses the corporation incurs for any reasons must be assessed to the membership. The members, through the increased assessment, do not eliminate the loss, they only subsidize the corporation. Thus Plaintiff sustained a real loss when Defendant cancelled the contract.

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*See *City of Memphis* v. *Ford Mortor Co.,* 304 F. (2d) 845 (C. A. 6, 1962).

Appendix B

After receiving notice of cancellation, Plaintiff stopped its transmission of news into the Cincinnati area. It thereby saved the $43 per week which represented the cost of the wire and mechanical facilities used in the transmission of the news. Plaintiff's income was, therefore, reduced by $1,540.81 per week for the 103 week period beginning July 26, 1958, and ending July 19, 1960.

Evidence of anti-trust violations as alleged in the defenses and counterclaim were (sic) not shown. As a matter of law, they (sic) cannot prevail.*

The Court finds the issues raised in the complaint in favor of the Plaintiff, and that the Defendant has failed to prove the issues raised in the affirmative defenses and counter-claim. Accordingly, it is ordered that Plaintiff recover from the Defendant damages in the sum of $158,703.43,** the amount shown in the amended complaint with interest from July 26, 1958, together with costs of this action.

/s/ FRANK J. BATTISTI,
United States District Judge.

Dated April 5, 1963

**Dehydrating Process Co.* v. *A. O. Smith Corp.*, supra, and *Times-Picayune Publishing Co.* v. *United States*, supra.

***Damages are determined under the rules set out in *Star-Chronicle Publishing Co.* v. *United Press Assn.*, 204 F. 217 (C. A. 8, 1913), *Appeal dismissed*, 232 U. S. 714 (1914), *cert. denied*, 232 U. S. 721 (1914); *Allen, Heston & McDonald, Inc.* v. *Castle Farm Amusement Co.*, 151 Ohio St. 522 (1949).

APPENDIX C

Judgment of Court of Appeals
(Filed January 18, 1965)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,514

THE ASSOCIATED PRESS,
Plaintiff-Appellee,

vs.

TAFT-INGALLS CORPORATION,
Defendant-Appellant.

Before:

O'SULLIVAN, PHILLIPS and EDWARDS, *Circuit Judges.*

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court awarding damages against appellant is reversed and the case remanded with instructions to dismiss the complaint.

Appendix C

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS
Clerk

COSTS: To be recovered by Appellant

Filing fee	$25.00
Printing appendix	$ —
Bond premiums	$ —
Total	$25.00

APPENDIX D

Order Denying Petition for Rehearing *en Banc*
(Filed February 25, 1965)

No. 15,514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE ASSOCIATED PRESS,
Plaintiff-Appellee,

v.

TAFT-INGALLS CORPORATION, formerly known as The Cincinnati Times-Star Company,
Defendant-Appellant.

ORDER

Before WEICK, Chief Judge; and MILLER, CECIL, O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing *en banc* be and hereby is denied.

ENTERED BY ORDER OF THE COURT:

CARL W. REUSS
Clerk

APPENDIX E

Order Denying Petition for Rehearing
(Filed February 27, 1965)

No. 15,514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE ASSOCIATED PRESS,
Plaintiff-Appellee,

v.

TAFT-INGALLS CORPORATION etc.,
Defendant-Appellant.

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Judge O'Sullivan would grant the petition for rehearing, for the reasons set forth in his dissenting opinion.

ENTERED BY ORDER OF THE COURT:

CARL W. REUSS
Clerk

APPENDIX F

Statutes Involved

Section 1 of the Sherman Act, 15 U. S. C., Section 1 (26 Stat. 209; 50 Stat. 693; 69 Stat. 282), reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any

combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U. S. C., Section 2 (26 Stat. 209; 69 Stat. 282), reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3 of the Clayton Act, 15 U. S. C., Section 14 (38 Stat. 731), reads:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof

shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act, 15 U. S. C., Section 15 (38 Stat. 731), reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 185

TAFT-INGALLS CORPORATION,

Petitioner,

v.

THE ASSOCIATED PRESS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

TAFT-INGALLS CORPORATION,

Petitioner,

v.

THE ASSOCIATED PRESS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Taft-Ingalls Corporation prays that a writ of certiorari be issued to review that part of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the case of *The Associated Press* v. *Taft-Ingalls Corporation* on January 18, 1965, that affirmed the judgment of the United States District Court for the Southern District of Ohio, Western Division, dismissing Petitioner's counterclaim for damages suffered from an illegal tying arrangement imposed by Respondent The Associated Press.

OPINIONS BELOW

The memorandum opinion of the District Court has not been reported. It is printed at pages 23a-32a of the Appendix for Defendant-Appellant (Petitioner herein) filed with the Court of Appeals. The opinion of the Court of Appeals for the Sixth Circuit is reported in 340 F.2d 753 and is appended hereto at pages 1a-55a, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1965; Respondent's Petition for Rehearing en Banc was denied on February 25, 1965; Respondent's alternative Petition for Rehearing was denied on February 27, 1965. An extension of time until May 28, 1965, within which to file this Petition was granted by Mr. Justice Stewart on April 8, 1965. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

Where both an illegal tying arrangement under the Sherman Act and injury to the buyer have been established, what is the measure of proof required of the buyer to prove the extent of his injury when the seller has no separate prices and maintains no separate cost records for the tied services?

STATUTES INVOLVED

The statutes involved are the Sherman Act, section 1 as amended, 15 U.S.C. § 1; Act of July 2, 1890, chapter 647, section 1, 26 Stat. 209; Act of August 17, 1937, chapter 690, Title VIII, 50 Stat. 693; Act of July 7, 1955, chapter 281, 69 Stat. 282; and section 4 of the Clayton Act, 15 U.S.C. § 15; Act of October 15, 1914, chapter 323, section 4, 38 Stat. 731, which are set forth at p. 56a as Appendix B.

STATEMENT OF THE CASE

Petitioner was an Ohio corporation which for many years published an evening daily newspaper at Cincinnati, Ohio, called *The Cincinnati Times-Star*, until July 19, 1958, when publication was discontinued (Par. 10 of Stipulation, P. Ex. 7; R. 92a, 418a at 420a-21a; R. 94a-95a).* Respondent (hereafter sometimes referred to as the "AP") is a "mutual and cooperative" non-profit membership corporation organized under the Membership Corporation Law of New York (By-Laws, Art. I, P. Ex. 6; R. 102a, 393a at 398a-99a; Par. 1 of Stipulation, P. Ex. 7; R. 92a, 418a-19a). The costs of Respondent's operations, consisting almost entirely of overhead and general and administrative costs (R. 326a-29a), are prorated among its members under a formula of assessments said to be based on population. As a member of the AP, Petitioner paid a weekly lump sum assessment for a "package" of basic news wire services which the Court of Appeals held to be an illegal tying arrangement (Appendix A hereto, at p. 25a). This "package" of services for Petitioner consisted of the "A" wire or general news wire carrying bulletin news of top general interest, the "D" wire carrying financial and business news, the Ohio Big Cities wire carrying Ohio regional news, and the Kentucky wire carrying Kentucky regional news. (Par. 13 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a-22a; R. 157a, 205a).

In 1957 Petitioner was publishing its newspaper at a loss. In an attempt to reduce its losses, on September 10, 1957, Petitioner asked Respondent to furnish it only the Ohio Big Cities news wire and to discontinue the other three news wires in Respondent's package. Respondent

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* P. Ex. is Respondent's Exhibit; D. Ex. is Petitioner's Exhibit. Exhibits are attached as part of Petitioner's Appendix (referred to as Appendix for Defendant-Appellant in the court below) filed with the Petition. All Record citations (R. ..) are to pages in Petitioner's Appendix.

refused Petitioner's request because of its long-established policy of requiring all members to receive and pay for a package of wire services (R. 109a-10a, 280a). Because the Ohio Big Cities news wire was essential to Petitioner's operations (R. 109a, 119a, 283a), it continued to pay the full weekly assessment for all of the basic news services until publication ceased on July 19, 1958, although it had a mounting deficit (par. 18(a), 20 of Stipulation; P. Ex. 7; R. 92a, 418a at 424a, 425a). The Court of Appeals found that if the request of Petitioner had been granted, it "would have effected a substantial reduction in appellant's [Petitioner's] operating costs." (Appendix A hereto, at p. 7a). The problem posed for Petitioner at the trial was to establish "how much" the reduction would have been.

Petitioner ceased publishing its newspaper on July 19, 1958, and sold some of its newspaper assets to The E. W. Scripps Co., publisher of the other Cincinnati evening newspaper. Respondent sued Petitioner in the District Court for the Southern District of Ohio for two years' wire service charges or assessments from July 26, 1958,* claiming breach of contract because of Petitioner's failure to give Respondent two years' advance notice. Respondent invoked federal diversity jurisdiction under Title 28 United States Code Sec. 1332.

Petitioner filed a counterclaim under Title 15 United States Code Sections 1 and 15, seeking to recover as damages not a loss of profits for any period, but only the extra cost of Respondent's unwanted news wire services for the period from September 10, 1957 to July 25, 1958, over and above the cost of the Ohio Big Cities news wire which Petitioner desired and which was the tying service.

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* Although publication ceased on July 19, 1958, Petitioner paid the weekly assessment through the following week ending July 26, 1958.

Except for the Kentucky wire, Respondent quoted no separate price for any of the news wires in its package (D. Ex. 35; R. 324a, 467a; D. Ex. 41; R. 289a, 497a-500a). The problem confronting Petitioner was to break down the lump sum package price among the four wires, a problem created by Respondent itself when it maintained no separate price schedule and no separate cost records. For Respondent it was all or nothing, except that the package was later offered by Respondent to Scripps without the Kentucky wire, which it then priced separately at $240.60 (D. Ex. 41; R. 289a, 497a). The problem remained to break down the lump sum price among the other three news wires in the package. Accordingly, Petitioner called upon Kirk Batzer of the accounting firm of Lybrand, Ross Bros. and Montgomery of New York, to review Respondent's costs in order to allocate Respondent's lump sum price in a reasonable way among the three remaining wires in the package. This he did in two reports (D. Ex. 54; R. 337a, 525a; D. Ex. 55; R. 337a, 541a). He also testified at length at the trial (R. 315a-44a). Respondent introduced no evidence which even questioned the breakdown of the assessment made by Petitioner's qualified expert. Moreover, Respondent offered no evidence of its own to establish a different cost or price of the various wire services.

An outline of the method used by Mr. Batzer to break down Respondent's lump sum price among the three news wires is attached at pages 58a-61a, as Appendix C. In brief, he determined what categories of Respondent's costs were properly attributable to the gathering and distribution of news provided in Respondent's basic news services. He included an appropriate share of general and administrative costs based on accepted accounting principles, and then allocated the total costs among the three wires based on a sampling of the volume of copy moving over each wire. He

concluded that a fair and reasonable breakdown of the weekly assessment paid by Petitioner was as follows: †

	SEPT. 16, 1957-DEC. 14, 1957 (*thirteen weeks*)	DEC. 16, 1957-JULY 26, 1958 (*thirty-two weeks*)
"A" wire	$ 695.63	$ 756.38
"D" wire	172.19	187.23
Ohio Big Cities wire	343.83	373.84
Total	$1,211.65*	$1,317.45**
Kentucky wire	240.60	240.60
Total Weekly Assessment	$1,452.25	$1,558.05

* Arithmetical Calculation based on D. Ex. 55
** See D. Ex. 55

This breakdown results in a calculation of Petitioner's damages, as follows:

	SEPT. 16, 1957-DEC. 14, 1957	DEC. 16, 1957-JULY 26, 1958
"A" wire	$ 695.63	$ 756.38
"D" wire	172.19	187.23
Kentucky wire	240.60	240.60
	$ 1,108.42	$ 1,184.21
	× 13	× 32
	$14,409.46	$37,894.72
		+ 14,409.46
Total Damage to Petitioner		$52,304.18

Treble damages are called for by Section 4 of the Clayton Act (15 U.S.C. Sec. 15), which amount to $156,912.54 ($52,304.18 × 3).

* Two separate periods, one from September 16, 1957 through December 14, 1957 and the other from December 16, 1957 through July 26, 1958, are involved because on December 16, 1957 the weekly assessment of Petitioner was increased by Respondent from $1,452.25 to $1,558.05.

The District Court (Judge Frank J. Battisti sitting without a jury) dismissed Petitioner's counterclaim for the reason that Petitioner had failed to show that there was "a natural division in the cost of gathering news transmitted" over the basic wire services (R. 30a). Judge Battisti held that unless "such a complete division" of costs could be shown, it would be "unnecessary and futile to explore the other elements of the alleged tying agreement" and, consequently, he never reached the issue of damages (R. 30a). The Sixth Circuit held that Respondent had engaged in an illegal tying arrangement and found that Petitioner had suffered injury. However, it dismissed Petitioner's counterclaim because "the evidence of damages is too speculative to support the counterclaim" (Appendix A, at p. 32a).

REASONS FOR GRANTING CERTIORARI

I. The Question Presented Is Of Importance In The Enforcement Of The Federal Antitrust Laws.

The characterization by the Sixth Circuit of Petitioner's evidence of damage as "too speculative" to support its counterclaim was unwarranted. The Court was not characterizing as "speculative" the evidence of the fact that Petitioner had suffered actual damage because it had found that Petitioner "would have effected a substantial reduction . . . in operating costs," if its request for only the Ohio Big Cities wire had been granted. We must necessarily conclude, therefore, that the Court was characterizing the evidence of the *extent* to which Petitioner was damaged.

Petitioner has maintained throughout this case that the calculation of the extent of its loss because of Respondent's unlawful practice was as reasonable and certain as could be made under the circumstances of this case. Respondent offered no evidence which challenged or questioned Petitioner's calculation in any way. If Petitioner's evidence of

damages is dismissed as "speculation," as was done by the Sixth Circuit, there is no apparent way for Petitioner or any other victim of Respondent's illegal tying arrangements, to prove its damages, and Respondent indeed would "profit by his wrongdoing at the expense of his victim." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, at 264 (1946).

What more could Petitioner have done in the instant case where there was no separate price for the unwanted news services and Respondent maintained no accounting records showing the separate costs of those services? In presenting its case Petitioner sought to follow guidelines established by this Court in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). In those cases the proof of the extent of damages was focused upon "loss of profits," where proof is more apt to be based upon conjecture and hypothetical comparisons than in a case of increased costs. While these guidelines may well be applicable to tie-in cases, there is no authoritative decision of this Court directly establishing how a buyer may prove the extent of his loss in such cases.

The illegal tie-in arrangement here is exemplary of many tie-in practices which by their nature preclude, or make extremely difficult, any certain determination of the amount of damages. This Court said in the *Story Parchment* case, 282 U.S. 555 (1931), at page 563:

> ". . . it would be a perversion of fundamental principles of justice to deny all relief to the injured person [Petitioner here and Buyers similarly situated in other tie-in arrangements], and thereby relieve the wrongdoer [Respondent here and Sellers similarly situated in other tie-in arrangements] from making any amend for his acts."

In the light of this statement a ruling by this Court on the proper standards to be applied in measuring the extent of damages in tie-in cases is critically needed.

II. The Sixth Circuit's Decision On Petitioner's Damages Was Erroneous Because Fundamental Principles Announced By This Court Were Not Followed.

This Court has held that a legitimate measure of damages in an antitrust case is the amount of the illegal exaction imposed by the offending party. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906); *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). As to the quantum of proof required to establish the "illegal exaction" or damages in an antitrust case, the well recognized rule is stated in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), at 563:

> "... it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Accord: Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

Once Petitioner established that it was a victim of an illegal tying arrangement and, in fact, was damaged, the last step was to prove the "extent of the damages" it incurred. Following the teaching of this Court, Petitioner showed that the illegal exaction was the amount which it was forced to pay for the unwanted wire services in order to obtain the Ohio Big Cities wire service which was indispensable to its business. Through its qualified expert, who obtained his information from relevant data in Respondent's possession, Petitioner showed that part of its

assessment which it was required to pay for three unwanted news wires in order to receive the Ohio Big Cities wire. If Petitioner's evidence did not satisfy the minimum requirement of showing "the extent of the damages as a matter of just and reasonable inference," it is difficult to conceive of any case involving the illegal tying of products not separately priced where an injured buyer could ever be fully redressed. More important, the instant decision on damages, which sets an unfortunate precedent, impedes the carrying out of Congress' intent in authorizing antitrust suits by private persons as expressed by this Court in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), at 751-52:

> ". . . Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

III. The Decision Below on Petitioner's Damages Was Inconsistent With Fundamental Principles Applied by the Sixth Circuit Itself and the Other Circuits.

In *Darden* v. *Besser*, 257 F.2d 285 (6th Cir. 1958), the Sixth Circuit affirmed an award of damages of $15,000 in a Sherman Act case, apparently for lost profits, where the trial court had rejected as evidence an estimate of future profits, but had accepted evidence of going concern value, goodwill, and the existence of a qualified staff and satisfactory credit arrangements with a supplier (147 F. Supp. 376, at 382). The Court cited no authority, remarking that "the compensation allowed seems quite low in the circumstances" (257 F.2d at 286). Such a holding is inconsistent with its holding in the instant case, where after finding that an illegal tying arrangement existed and that Petitioner had in fact been damaged, the Court

refused to accept the *only* available evidence of damages, characterizing it as "too speculative" (Appendix A, at p. 32a).

The Sixth Circuit's decision on damages in the case at bar is also inconsistent with the principles of measuring damages in the following recent cases: *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. den.*, 377 U.S. 993 (1964), in which the Ninth Circuit recognized that the excess cost of tied products to the coerced buyer was a legitimate element of the buyer's damages; *Osborn* v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963), a case based on an alleged tie-in of Goodyear TBA to a service station lease, in which the Fourth Circuit affirmed an award of actual damages "due to the slightly higher cost of the Goodyear TBA which Osborn purchased, over those brands he would have preferred" (324 F.2d at 570); and in *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F.2d 331 (2d Cir. 1953), *cert. den.*, 345 U.S. 994 (1953), in which the Second Circuit noted at page 334 that if the Sherman Act had been violated, "the actual damages flowing from that violation may well have included the additional amount which the plaintiffs had to pay because of the tie-in purchases they were compelled to make."

The decision of the Sixth Circuit in the instant case is also inconsistent with the principles governing the quantum of proof of damages required in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. dism'd.*, 371 U.S. 801 (1962). At page 578 the Tenth Circuit there affirmed the jury's action in setting a price which should have been paid to the miners for their ore at 2¢ per pound above the highest negotiated price in evidence, although the negotiated price did not yield a profit to the mills, which had actually lost money in operation. At page 580 the Court affirmed a jury finding of a free market price of 40¢ per pound rather than the 31¢ actually paid by the monopolists, on the basis of the

profit spread between the cost of vanadium ore and the price of oxide and ferrovanadium. The decision here is inconsistent with *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. den.*, 342 U.S. 909 (1952), in which the Seventh Circuit at page 566 upheld a verdict and judgment based on an accountant's comparison of the receipts of plaintiff's and defendants' theaters, specifically holding that once there had been proof of the fact of damage, defendants' attempts to show fallacies and inaccuracies in the exhibit prepared by the accountant were no reason to set aside the verdict; *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 69 F. Supp. 103 (E.D. Penna. 1946), *aff'd.*, 164 F.2d 1021 (3rd Cir. 1948), *cert. den.*, 334 U.S. 811 (1948), in which the Third Circuit affirmed the judgment below even though the trial court stated that there was an element of speculation or guesswork in its assessment of probable profits to be awarded as damages, since only approximate accuracy was required; and *William H. Rankin Co.* v. *Associated Bill Posters*, 42 F.2d 152 (2d Cir. 1930), *cert. den.*, 282 U.S. 864 (1930), in which the Second Circuit affirmed judgments for damages based in one case on an expert's projection of increasing profits, and in another on the jury's estimate of lost profits based on the company's financial history. The Court found that the fact of damage was certain and that the estimate of lost profit, introduced as such, was as good proof as the nature of the case allowed, pointing out that "the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony." 42 F.2d at page 155.

CONCLUSION

Petitioner submits that the decision of the Sixth Circuit in the instant case on the question of damages to Petitioner

from the Respondent's antitrust violation is inconsistent with settled principles which should be used in tie-in cases to govern both the measure of damages and the proof necessary to establish them. Unless reversed by this Court, such a decision will serve only to work mischief far beyond its immediate effect on Petitioner. That immediate effect is, of course, to deprive Petitioner of any chance to recover any part of its loss. Under the principles of damages applied by other Courts of Appeals and even by the Sixth Circuit (prior to the instant decision), Petitioner clearly was entitled to recover that loss.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT T. KEELER
ROBERT G. STACHLER
Attorneys for Petitioner.

Appendix A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15514

THE ASSOCIATED PRESS,

Plaintiff-Appellee,

v.

TAFT-INGALLS CORPORATION, formerly known as The Cincinnati Times-Star Company,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

OPINION

Decided January 18, 1965.

Filed January 18, 1965.

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

PHILLIPS, Circuit Judge. Three principal daily newspapers were published in Cincinnati, Ohio, prior to 1958: (1) An afternoon newspaper owned by appellant, known as The Cincinnati Times-Star, (2) The Cincinnati Post, also an afternoon paper, which was a part of the Scripps-Howard system; and (3) The Cincinnati Enquirer, a morning paper. As of July 19, 1958, publication of The

Times-Star was discontinued and the paper was sold to the owner of its afternoon competitor, the E. W. Scripps Company, and the combined afternoon newspaper thereafter has been published under the name of The Cincinnati Post and Times-Star.

Appellee, the Associated Press, filed a breach of contract action against appellant for failure to pay assessments for the AP's news services for two years following discontinuance of publication. Jurisdiction is based upon diversity of citizenship. The district judge, sitting without a jury, rendered judgment against appellant in favor of the Associated Press for $158,703.43, plus interest and costs, and dismissed a counterclaim. This appeal is from the judgment of the district court.[1]

A motion to dismiss the appeal was denied. *The Associated Press* v. *Taft-Ingalls Corporation*, 323 F.2d 114 (C. A. 6).

The Associated Press is a non-profit corporation organized in 1900 under the Membership Corporation Law of New York. It is engaged in gathering, obtaining and procuring any and all kinds of news, which it furnishes to its members for publication. The membership of AP consists of owners of newspapers and radio and television stations. There are two types of membership, regular and associate. The costs of its operations are prorated among the members under a formula of assessments adopted by the Board of Directors, acting under the authority of its By-laws.

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[1] Contemporaneously with the sale of its newspaper, the name of appellant, an Ohio Corporation, was changed from The Cincinnati Times-Star Company to Taft-Ingalls Corporation. Appellee sometimes will be referred to in this opinion as "The Associated Press" or "AP," the Cincinnati Times-Star as "Times-Star," the Cincinnati Post and Times-Star as "Post and Times-Star," the E. W. Scripps Company as "Scripps," the United Press as "UP," the International News Service as "INS," and United Press International as "UPI." UP and INS were merged into UPI in 1957.

Appendix A

At the time of the incorporation of AP in 1900, a representative of Times-Star applied for and was admitted to AP membership. Times-Star subscribed to and used AP wire services as a regular member continuously from that time until discontinuance of publication 58 years later.

1) *The Contract Between The Parties*

This controversy arose out of a contract between the parties, entered into August 4, 1948, which provided that: "[I]t shall continue . . . until terminated by the Member upon two years' notice, in writing, by registered mail . . ."; and further provided that: "Upon the sale or transfer of the business of the Member to which this agreement relates, the Member shall cause the Member's successor to agree in writing to fulfill the terms and conditions of this agreement during the term thereof and to apply for membership in The Associated Press in the same class as the Member."

When appellant stopped publication of Times-Star on July 19, 1958, AP was informed by telegram of the sale to Scripps and the following directions were given: "Accordingly please cancel all services . . . immediately under our contract with you." No back assessments were owing by appellant when publication of Times-Star ceased. The weekly assessment of appellant was paid through June [sic] 26, 1958, one week after publication of Times-Star had been discontinued. Thereafter no services were furnished by AP to appellant and no further payments were made. The only assessments at issue in this case are those for the two-year period after termination of publication and after delivery of the AP news wire services to appellant had been discontinued.

The district judge held that appellant was liable to AP for weekly assessments for its wire news service for the

two succeeding years because appellant had not notified AP two years in advance of its termination of the news services,[2] and since Scripps did not become a member of AP and did not subscribe to the AP wire services previously furnished to appellant. The judgment is based upon the assessment of $1583.81 per week which was in effect on the date of termination of publication, less a saving to AP of $43 per week representing the cost of the wire and mechanical facilities, or net damages to AP of $1540.81 per week for 103 weeks.

2) *The AP Wire Services*

Appellant alleges and appellee admits that AP has an established practice of requiring a member newspaper in the metropolitan cities of this geographical area of the United States to receive and pay for all three of its basic news wire services to such city, and, in addition, in Cincinnati, required appellant to receive and pay for the Kentucky wire as a part of the basic service. This practice, appellant contends, constitutes an unlawful tying arrangement in violation of Section 1 of the Sherman Act,[3] and renders the contract void and unenforcable.

This AP policy and practice of "tying" four wire services together in a single "package" and requiring that appellant

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[2] In June 1954, appellant transferred ownership and publication of Times-Star to its wholly-owned subsidiary, The Cincinnati Publishing Company, which in turn sold the newspaper to Scripps four years later. Appellant's contract with AP was never assigned to its subsidiary. AP had no cause to deal with the subsidiary because appellant continued to act as a member. The District Court held that there was no novation within the requirements of Ohio law. This intervening period of ownership and operation by appellant's subsidiary is not considered to have any significance for the purposes of this appeal.

[3] 15 U.S.C. § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

take and pay for four wire services in order to receive any one of them is the principal issue on this appeal.

The wire[4] services provided by AP under its contract with appellant were described in a letter from AP's Chief of Bureau at Columbus, Ohio, to the editor of Post and Times-Star dated August 1, 1958, as follows:

> "Pursuant to our telephone conversation I am listing below the basic news service that was delivered to the Cincinnati Times-Star and is proposed to be delivered to the Post and Times-Star;
>
> "'A' *trunk circuit.* This is a general news wire carrying stories of top general interest.
>
> "'D' *trunk circuit.* This circuit carries financial stories, commodity quotations and other business news.
>
> "*Ohio Big Cities Circuit.* This circuit carries Ohio, regional and general news copy.
>
> "*Kentucky regional.* Two circuits, one operating in TTS style, one in all-caps, deliver Kentucky state news.
>
> "*Wirephotos.* Full service on this facility consists of the delivery of glossyprints from day and night operation.
>
> "The assessment for the basic minimum news service outlined above is $1,558.05 weekly.
>
> "The assessment for Wirephoto service is $279.80 weekly.
>
> "In addition, the Times-Star received various optional services . . ."

A stipulation of facts entered into between the parties describes the basic AP wire services furnished to Times-Star as follows:

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[4] The use of the word "wire" grows out of the earlier method of transmitting news over telegraph by Morse Code. The term is explained in the record as follows: "It is not a physical wire; it is an electronic channel. In many cases there is no wire, it is a wireless beam used by the telephone company or Western Union."

"The leased wire news service referred to in the above contract between the AP and the Times-Star consisted of general news and stories of general interest carried and transmitted over the "A" trunk circuit; the financial stories, commodity quotations and business news carried and transmitted over the "D" trunk circuit; and the Ohio regional news and general news copy carried and transmitted over the Ohio Big Cities circuit."

3) *Times-Star's Efforts to Reduce Costs*

Faced with an operating deficit, appellant undertook, beginning in 1957, a stringent cost reduction program in an effort to make it possible for Times-Star to survive. A survey was made of AP, UP and INS wire costs. A substantial item of expenditure was the AP assessment, which at that time was $1452.25 per week. Appellant determined that it did not need all of AP's basic news services. On August 14, 1957, appellant wrote a letter to AP, the text of which is printed in the margin.[5] A meeting was held in Cincinnati between representatives of AP and appellant on September 10, 1957, for the purpose of discussing a reduction in the basic news services. During this meeting appellant requested AP to furnish to it only the Ohio Big Cities circuit, which was considered the "most necessary" to appellant of the AP news services. This request would have eliminated the "A," "D" and Kentucky wires, and, if

[5] "We are undergoing a stringent cost reduction program at the TIMES-STAR and in surveying our wire service costs, we feel that the Basic News Service charge of $1,452.25 weekly is excessive.

"Our files will show that we have greatly reduced the amount of AP copy that we are carrying and as we have no Sunday edition, many AP features are of no use to us.

"An analysis of our rates shows that a figure somewhere in the neighborhood of $700 per week would come much closer to our use of the service.

"We will anticipate discussion on the subject before taking any other action."

granted, would have effected a substantial reduction in appellant's operating costs. AP declined this request, stating that it was the practice of AP to require all members at Ohio trunk points to receive and pay for the "A," "D" and the Ohio Big Cities news wires, and that appellant must continue to pay the unit price for all these wires in order to receive any of them.

Previously appellant had requested information of AP as to how much was being paid for the Kentucky State wire. AP replied that:

> "The Kentucky state service, subject of your October 25 inquiry, is part of the basic Associated Press service in Cincinnati, and provision of this service is an integral part of the basic service covered by your Agreement.
>
> "There is a payment of $10.00 weekly toward maintenance of The Associated Press bureau in Lexington, but there is no separate charge for the Kentucky state wire other than that included in the contract figure. This wire is not one of the various optional services not covered by the contract figure."

Its request having been turned down, appellant continued to receive and pay for all of said basic services until continued operating losses of Times-Star compelled discontinuance of publication on July 19, 1958.

Immediately thereafter Scripps proposed to subscribe to the AP "A" wire trunk circuit service and to become an associate member of AP for that purpose. AP declined to provide "A" wire service to Scripps unless Scripps also would agree to subscribe to the "D" wire and the Ohio Big Cities wire (also known as the "S" wire). This policy of treating these three wire services as one inseparable "economic package" has been applied consistently by AP to

metropolitan newspapers in this area of the United States, consisting generally of the area north of the Mason-Dixon line and east of Kansas City, Missouri.[6]

In addition to asserting that this "tying arrangement" was a violation of the Sherman Act and a valid defense against AP's breach of contract action, appellant filed a counterclaim seeking $157,366.92 in treble damages against AP under the Sherman Act.

The district judge ruled that:

> "The Sherman Act's interpretation has broadened considerably since the early tie sales cases which involved products tied to patent products. It is entirely possible that the Plaintiff's method of dispensing its news is in violation of the Sherman Act." But that: "Defendant has failed to provide this Court with sufficient facts upon which it may be concluded that there is a natural division in the cost of gathering news transmitted over the A, D, and State trunks. Without such a complete division, it is unnecessary and futile to explore the other elements of the alleged tying agreement."

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[6] AP has approximately 250,000 miles of leased news wire connecting most of the cities of the United States. This network of wires is leased by AP from the American Telephone and Telegraph Company and the Western Union Telegraph Company. In each AP office and in the office of each AP member where there are AP employees, there is one transmitting machine and one receiving machine attached to each circuit for the purpose of transmitting and receiving news on the circuit. Each member that uses this kind of equipment leases it from AP and pays AP for it. There are approximately 43 metropolitan areas throughout the country including Cincinnati, which are considered by AP to be "trunk point cities." These cities make up the major newspaper markets of the United States.

News originating in the United States is not sent to a single point, but is transmitted to AP members directly from the AP news bureau in the area in which the news originates. News from abroad is sent to AP offices in New York, from which it is transmitted throughout the United States. Leased wire services furnished to newspapers in smaller cities are transmitted over a single circuit, and to members in large cities over multiple circuits. As held by the District Court: "These multiple circuits, commonly called trunks, have come into existence because, under present technology, it is impossible to transmit all state, national and international news on one circuit."

The district court ruled that on the "paucity of facts," appellant cannot prevail either in asserting violation of the Sherman Act as a defense or under its counterclaim.

4) *Application of Sherman Act to AP*

It is clear that the Associated Press is subject to the provisions of the Sherman Act. As said by the Supreme Court in *Associated Press* v. *United States*, 326 U.S. 1, 7:

> "Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. See *International News Service* v. *Associated Press*, 248 U.S. 215, 229, 230. All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."

It follows that if an illegal tying agreement is established by the evidence in this case, AP cannot escape the consequences on the theory that it is a mutual and cooperative association, distributes news only among its own members, pays no dividends, defrays its expenses through assessments, and does not "sell" news for a "price."

5) *The "Tying" Arrangement*

The burden of proving that a contract is illegal is upon the party asserting it, which in this case is appellant. *Palmer* v. *Chamberlin*, 191 F.2d 532 (C.A. 5); *Illinois Surety Co.* v. *O'Brien*, 223 Fed. 933 (C.C.A. 6).

It is undisputed that AP refused to furnish the Ohio Big Cities news circuit separately to appellant and required that

appellant, against its own will and business judgment, continue to subscribe and pay for three services which it did not want, the "A," "D" and Kentucky wires, in order to receive the Ohio regional wire which appellant considered to be essential to its operations. Do the facts concerning this practice, which has been adhered to consistently by AP ever since establishment of the "D" wire in 1935, coupled with evidence concerning other essential elements of anti-trust violation as hereinafter discussed, constitute a violation of Section 1 of the Sherman Act under the record in this case? If so, it is axiomatic that the contract between appellant and AP is "illegal" under the express terms of the statute. 15 U.S.C. § 1. A party to an illegal bargain cannot "recover damages for breach thereof." *Restatement, Contracts*, § 598; also § 514, special note. As said by the Supreme Court in *United States* v. *Loew's Inc.*, 371 U.S. 38, 51: "[T]he thrust of the antitrust laws cannot be avoided merely by claiming that otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives."

A tying arrangement has been defined as follows:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product. . . ." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5.

Such arrangements are frowned upon and in some situations are declared unlawful *per se* because, as the Supreme Court has pointed out: "[T]ying arrangements serve hardly any purpose beyond the suppression of competition." *Northern Pacific Railroad Co.* v. *United States*, 356 U.S.

1, 6; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 25; *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305.

6) *Separability*

AP insists that it is engaged in distributing only one product, news from all parts of the world—international, national and local—and that the news transmitted by it is so intermingled that it is inseparable; that although news is transmitted to metropolitan newspapers over several circuits, these circuits are interdependent and form an integrated whole in the delivery of the leased wire news service; that the means by which news is transmitted does not determine the character of the news; and that the leased AP wire news service is a single product and not several separate and distinct products. AP relies upon the proposition that the essential element of an illegal tying agreement is an obligation imposed by one party upon another to take or purchase an unwanted product as a condition to obtaining a desired product, and that a tying agreement cannot exist within the meaning of the anti-trust laws unless the sale of one product is conditioned upon the purchase of another separate and distinct product.

The question of separability is the first issue to be determined on this appeal. In disposing of this issue, however, it is not necessary to pass upon the separability of all four of the wire services furnished by AP to appellant. We are not required to decide whether the "A" wire is separable from the "D" wire, since Times-Star concluded that it did not want or need either of these services. Neither are we required to decide whether the Kentucky State wire was separable from the other services. The only issue of separability is whether the Ohio Big Cities wire was a separable product as distinguished from the other three wires; that is,

was the Ohio Big Cities wire, the "tying" product, separable from the "A," "D" and Kentucky wires, the "tied" product.

Even if it be concluded that the Ohio Big Cities wire was used principally to transmit news of regional and local interest and that the other wire services were used principally to transmit news of different classifications, we are faced with the problem of whether the Ohio wire represents a separate product, or whether it and the other three services involve but *one* product, that is, news. Though separability of products is an element in every tying case, it has rarely posed a problematical issue before the courts. See *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 559, n. 25 (E.D. Pa.), aff'd, per curiam, 365 U.S. 567, rehearing denied, 365 U.S. 890.

In adjudicating the question here involved, we begin by looking to those few cases which bear on separability, although each of them involves distinguishable facts.

In *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, the Supreme Court held that a New Orleans publishing company did not violate the antitrust laws in requiring that advertising space be purchased in both the morning and afternoon newspapers. One of the reasons for the Court's holding was its difficulty in delineating two distinct products. The Court said:

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact,

> since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same." 345 U.S. at 614.

AP relies heavily upon *Times-Picayune* in support of the decision of the district court. It should be noted, however, that the rationale of *Times-Picayune* as to "market dominance" was weakened by the subsequent decision in *Northern Pacific Railroad Co.* v. *United States, supra*, 356 U.S. 1. Furthermore, in contrast to *Times-Picayune* on the tying issue, there was a dominant "tying" product in the instant case as applied to appellant, to wit, the Ohio Big Cities news service. This was the "tying" product which appellant considered essential to its operations, while not desiring to continue its subscription to the "tied" products, the "A," "D" and Kentucky State wires. It should be added that, as to the force of *Times-Picayune* as a precedent, one court recently said: "Furthermore, the Times-Picayune case has been limited to the exact set of facts before the court. . . ." *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848, 850 (S.D. N.Y.).

In *United States* v. *Loew's Inc., supra*, 371 U.S. 38, the defendants distributed motion picture films to television stations by the method known as block booking; that is, TV stations were required to purchase a package of films to get any at all. In this way film producers were able to tie bad films to the desirable ones. It was argued, *inter alia*, that "movies" were a single product and that there was no separability of two distinct products. The Court answered this contention by saying: "The district judge found that

each copyrighted film block booked by appellants for television use 'was in itself a unique product'; that feature films 'varied in theme, in artistic performance, in stars, in audience appeal, etc.,' and were not fungible. . . ." 371 U.S. at 48.

A decision in which the facts have some analogy to the instant case is *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, *supra*, 221 F. Supp. 848 (S.D. N.Y.). There Kemper Insurance desired to sponsor an ABC television program on 95 affiliated stations. These stations were geographically situated where Kemper's advertising would be most effective. ABC refused the offer unless Kemper would also sponsor the program on 35 additional stations. ABC argued that only one product was there involved, to wit, sponsorship of TV programs, and that there was no separability of two or more distinct products. The court disagreed, saying that 35 undesirable stations are not the same as 95 desirable stations. 221 F. Supp. at 850.

A leading case in this area, for its discussion of separability of products, is *United States* v. *Jerrold Electronics Corp.*, *supra*, 187 F. Supp. 545 (E.D. Pa.), aff'd per curiam, 365 U.S. 567, rehearing denied, 365 U.S. 890, involving master television antenna systems for dealers, apartment houses and communities normally unable to receive television signals. Jerrold would not sell its equipment unless the customer would also purchase a service contract which would assure Jerrold supervision over the installation and maintenance; and also would not sell its various items of equipment designed for community antenna systems separately, but would only sell them as components of a complete system. In holding that this practice violated the Sherman Act, the court first passed upon the question of separability. This issue was stated as follows:

"The difficult question raised by the defendants is whether this should be treated as a case of tying the sale of one product to the sale of another product or merely as the sale of a single product. It is apparent that, as a general rule, a manufacturer cannot be forced to deal in the minimum product that could be sold or is usually sold. On the other hand, it is equally clear that one cannot circumvent the anti-trust laws simply by claiming that he is selling a single product." 187 F. Supp. at 559.

The court then proceeded to state four criteria of separability which are discussed hereinafter at page 16 of this opinion.

In *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653 (C.A. 1), cert. denied, 368 U.S. 931, relied on by the district court in the instant case, the defendant manufactured silos and an unloader which could be installed at the base of a silo. For six years defendant made it a practice to sell its unloader separate from its silo. A number of customers complained that the unloader would not operate successfully on silos of another make. To meet this problem, defendant adopted a policy of not selling unloaders unless they were to be installed in presently-purchased or already-owned silos of its own manufacture. The question was whether this was a tying arrangement which violated the anti-trust laws.

The court held that in light of the customer complaints the defendant was justified in adopting its new policy; and that the requirement that the unloaders be installed only in defendant's silos was reasonable under the circumstances.

Thus it will be seen that the court's decision does not really turn on the question of inseparability. In fact, by basing its decision on "sound business reasons," the court

would seem to presuppose that there are two separate products.

The *Dehydrating Process Co.* case obviously would be more nearly analogous on its facts to the instant case if the manufacturer had required the purchase of an unloader as a prerequisite to the purchase of a silo.

One of the evils inherent in any tying arrangement is that it forces the buyer to give up his independent judgment as to whether, or where, to purchase the tied product. *United States* v. *Loew's Inc.*, *supra*, 371 U.S. 38, 45; *Northern Pacific Railway Co.* v. *United States*, *supra*, 356 U.S. 1, 6.

Turning again to the instant case, there can be no doubt that the arrangement here involved forced the publishers of Times-Star to give up their independent judgment as to which of the wire services was required for its operations. At the time AP refused to furnish appellant the Ohio Big Cities wire to the exclusion of the "A," "D" and Kentucky wires, Times-Star was a subscriber to various other wire services. It began using certain UP services in July 1955, and at that time already was an AP and INS subscriber. It was receiving the UP national wire, state wire and sports wire.

Certain of these services were duplications. Appellant's executives, in an effort to combat an operating deficit, concluded that the AP "A," "D" and Kentucky services no longer were required. The amount of AP copy published in Times-Star had been greatly reduced. The former assistant to the publisher of Times-Star testified that "we had good coverage in Northern Kentucky" and "had quite a staff over there," and that the AP Kentucky wire was no longer needed. He further said that if the AP "D" wire had been dropped as requested, he would have subscribed

to the UPI financial wire. On the other hand he described the AP Ohio Big Cities wire as "essential" to the publication of Times-Star. The former Times-Star telegraph editor testified that the AP Ohio Big Cities wire "was far superior to the United Press state service." The former publisher of Times-Star described the Ohio Big Cities wire as "the major service of The Associated Press" for Times-Star purposes, and said that "we needed that service very badly."

In this situation, who better than appellant was in a position to choose which wire services it needed and wanted and to exercise independent judgment to that end?

Yet the record clearly establishes that AP required appellant to continue to subscribe and pay for three wires which appellant did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services. This is one of the situations which is "an object of anti-trust concern." *United States* v. *Loew's Inc., supra,* 371 U.S. 38, 44-45.

Lending support to the view that the Ohio Big Cities wire is separable from its other wires is AP's treatment of the Kentucky wire. AP had refused to give Times-Star a separate quotation for this wire, taking the position that it was a part of the basic service for Cincinnati. Earlier in this opinion we have quoted AP's statement in a letter to appellant that the Kentucky wire was "part of the basic Associated Press Service in Cincinnati, and provision for this service is an integral part of the basic service covered by your agreement." When Scripps bought the paper in 1958, and proposed to subscribe to the "A" wire, AP agreed to eliminate the Kentucky wire from its basic service, there-

by reducing the assessment by $240.60 per week. It had refused to quote a separate assessment to appellant for the Ohio Big Cities wire, yet it was able to quote a separate charge to Scripps for the Kentucky wire. Thus the cost of the Kentucky wire was separated for Scripps. The parallel conclusion as to the separability of the Ohio Big Cities wire seems obvious to us.

By this action AP demonstrated, contrary to the findings of the district court, that the cost of a state wire can be separated from the cost of its other wire services. On the question of the separability of charges we see no difference between the Kentucky State wire and the Ohio Big Cities regional wire.

Further, the AP sports wire, which formerly was a part of the basic wire service, was separated and a specific charge was made therefor. AP permitted Times-Star to cancel this separate service in 1956. Other services, such as the wirephoto service, were provided by AP on an optional basis, and for specific separate charges.

The evidence further establishes that the Ohio Big Cities wire was operated at different hours from the other services. The Ohio wire was controlled from Columbus, Ohio, while the other wires were controlled elsewhere. The Ohio wire was physically separable in that it connected different cities and could be added to or taken from the service provided to any newspaper. The "A" wire connected 193 larger cities; the "D" wire connected 56 cities; the Ohio Big Cities wire connected ten cities in Ohio and West Virginia, two of which did not receive the "D" wire and one of which did not receive either the "A" wire or "D" wire. Separate receiving equipment was required for each wire.

In support of its contention that its news services are not separate and distinct products, AP introduced evidence that the "D" wire sometimes is used for the transmission of

general news in addition to business, financial and market news, particularly if the "A" wire at the moment cannot accommodate such news; that general news of all kinds in addition to regional news is transmitted over the Ohio Big Cities wire; that news from abroad on occasion has been carried on all of the wires in question; and that if there were four or five major stories coming in at one time, it might be impossible to put them all on one wire, and the excess would be "spilled over" on other wires. Although news may be "spilled over" from the other wires to the Ohio Big Cities wire when the AP circuits are overloaded, this fact was well known to appellant. It was the prerogative of appellant to decide whether it chose to subscribe only to the Ohio Big Cities service, and thereby take the chance of receiving incomplete "spilled over" news of international, national and financial events in addition to the regional and local news carried over the Ohio Big Cities wire.

With reference to the practice of "spilling over" news, the record shows that news from the "A" wire sometimes is "spilled over" on the "D" wire or on the Ohio Big Cities wire, and that "A" and "D" wire news may be "spilled over" on the Ohio Big Cities wire, but we find no evidence that the Ohio regional news which Times-Star considered so essential to its operation, was "spilled over" on the "A," "D" or Kentucky wires. Quite obviously it would be rare indeed for news of local and regional interest carried over the Ohio wire to ten cities in Ohio and West Virginia to be "spilled over" on the "A" wire connecting 193 cities, the "D" wire connecting 56 cities, or the Kentucky state wire carrying news of primary interest to readers in the Kentucky area.

It is clear that Times-Star found it necessary to continue its subscription to the Ohio Big Cities wire because this was

the only wire service providing satisfactory coverage of news of regional and local interest. AP contends that the transmission of regional and local news did not make the Ohio wire separable, because there are duplications of news carried on this and other wires. The evidence shows, however, that when there is a duplication, it is because the duplicated news item is a matter of interest to newspaper readers in the Ohio area. For example, if the President of the United States spoke at Cleveland or Columbus, Ohio, the story would be transmitted over the "A" wire and also over the Ohio Big Cities wire. A financial story of nationwide interest originating in Ohio might be carried over both the "D" wire and the Ohio Big Cities wire. If a major accident occurred in Ohio, resulting in a substantial number of deaths, it would be carried over the "A" wire, and perhaps also over the Ohio Big Cities circuit. A minor accident in Ohio resulting in one death ordinarily would be reported only over the Ohio Big Cities circuit.

In *United States* v. *Jerrold Electronics Corporation, supra,* the court laid down four criteria of separability as follows:

> "There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered all of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum for the total system. Finally, while Jerrold had cable and antennas to sell

which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it." 187 F. Supp. at 559.

Transposing these four criteria of separability to the facts of the instant case, we find:

1. AP's competitor, UPI, offered everything necessary for a complete news service, but did not charge for its basic wires in a single package as did AP;

2. The number of news dispatches of AP and other news services vary considerably and are used by newspapers as space and interest warrant. Hardly any two versions are the same;

3. UPI charges separately for its news wires, as does AP for the Kentucky wire (at least in its proposal to Scripps), the sports wire, and various supplemental wires;

4. Finally, AP offered certain wires on an optional basis, but required appellant to subscribe for the "A" wire, "D" wire and Kentucky wire on a "package" basis in order to receive the Ohio Big Cities wire.

It is true that no tying arrangement is spelled out expressly in the contract between the parties upon which AP based this action, or in the AP By-Laws. The result is accomplished by the By-Law provision that the nature and extent of the news service to be furnished a member shall be determined by the Board of Directors.[7]

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[7] Article VII, Section 1 and 2 of the By-Laws, entitled "Use of News," provides as follows:

"Sec. 1. The nature and extent of the news service to be furnished to a member shall be determined by the Board of Directors, upon the member's admission, and the initial assessment shall be fixed at the same time and by the same authority. Both the nature and extent of such news service and the assessment may be changed from time to time by the Board of Directors, provided that the Board of Directors shall not omit the news service to any member except for cause as provided in these By-Laws.

Appendix A

A tying arrangement or condition "need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct." *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 837 (C.A. 4), cert. denied, 366 U.S. 963. The tying arrangements found unlawful in *United States* v. *Loew's Inc.*, *supra*, and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, were not spelled out in contracts. As said in *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (C.A. 4):

> "Admittedly, the written agreement between the parties contain no provision requiring the franchisees to deal only in goods supplied by Western Auto. This, of course, merely means that the contract is not unlawful on its face. The writing could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found."

The district court laid strong emphasis upon its finding that the record in this case contains insufficient evidence to establish a natural division in the costs of gathering news transmitted over the "A," "D" and Ohio Big Cities wires and the amounts of the costs to AP of providing these respective services. It expressly held that appellant "has failed to provide this court with sufficient facts upon which it may be concluded that there is a natural division in the costs of gathering news transmitted over the A, D and state trunks." A finding of fact by the district court is binding upon this court unless "clearly erroneous." Rule

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"Sec. 2. Each member shall take the news service of the Corporation as specified in Section 1 of this article and use it in whole or in part as provided in his or its contract with the Corporation and in conformity with the By-Laws thereof."

Paragraph 6 of the contract between the parties provides:

"In the event that any of the terms and conditions of this agreement shall be or become contrary to or inconsistent with the By-Laws of the Associated Press, the By-Laws shall control."

52(a), Fed. R. Civ. P. It is our obligation as an appellate court to overrule the "clearly erroneous" findings of the district court in an anti-trust case, as in other civil actions tried by a district judge without a jury. *Osborn* v. *Sinclair Refining Co., supra*; *Becken* v. *Gemex Corp.*, 272 F.2d 1 (C.A. 7), cert. denied, 362 U.S. 962; *Ball* v. *Paramount Pictures*, 169 F.2d 317 (C.A. 3), cert. denied, 339 U.S. 911; 6 *Toulmin's Anti-Trust Laws*, § 21.24 (1951). As said in *United States* v. *Gypsum Co.*, 333 U.S. 364, 395: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We agree with the district court that such evidence would be indispensable to support the counterclaim filed by appellant. The only evidence in the record on this question was offered by an accountant employed by appellant for the purpose of allocating the basic AP assessment among the "A" wire, the "D" wire and the Ohio Big Cities wire. We agree with the district court that this evidence was too speculative to support the counterclaim filed by appellant for the recovery of treble damages against AP. The record shows that AP did not keep its records in such a manner as to establish an accurate division of costs as between its three basic wire services. We are of the opinion, however, that the determination of the existence of a tying arrangement which is illegal under the Sherman Act, thus constituting a complete defense to AP's action for breach of contract, is not controlled by the way AP has kept its cost records.

AP was able to arrive at a specific charge of $240.60 per week for its Kentucky wire when it decided to offer this concession to Scripps. The AP wirephoto service was priced separately at $278.80 per week. Separate charges also were

established for the sports wire and other optional services, some of which formerly were a part of the basic service. We have no doubt that a division could be made by AP for a separate charge for its Ohio Big Cities wire. Once it is determined that separability exists, it is not important that AP might experience inconvenience in making a breakdown of charges.

The basic error of the district court was in holding that, in order to establish its affirmative anti-trust defense, it was obligatory upon appellant to prove that there was a natural division of costs in gathering news transmitted over the Ohio Big Cities wire and the other wires in question. We do not construe the decisions to impose such a burden upon a defendant asserting an anti-trust defense. Once the other elements of an unlawful tie-in have been established, appellant's defense should not be nullified by the manner in which AP keeps its books or the unavailability of cost records upon which a precise computation of separate costs could be made.

We hold that this finding of fact by the district court was based upon an incorrect premise and was "clearly erroneous" as applied to the Ohio Big Cities wire. This holding applies *only* to the Ohio Big Cities wire. We do not hold that the AP "A" and "D" are distinct products separable the one from the other, nor do we hold that the AP "B" wire, which is in use in certain areas other than Cincinnati, is a separate and distinct product. Our holding on the issue of separability is limited solely to the Ohio Big Cities wire; that is, that the Ohio regional wire is separable and distinct from the other three wires involved in the contract between AP and appellant.

It is our opinion that the facts hereinabove set forth establish that the Ohio Big Cities wire was a product

separate and distinct from the other AP wire services, just as were motion picture films in *United States* v. *Loew's Inc.*, *supra*, the television program in *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, *supra*, and the community television antenna equipment in *United States* v. *Jerrold Electronic Corporation*, *supra*. We further hold that the established practice of AP in requiring appellant to receive and pay for the "A" and "D" wires, plus the Kentucky state wire, as a prerequisite to receiving the Ohio Big Cities wire, constituted a tying arrangement susceptible to violation of Section 1 of the Sherman Act.

A holding that the Ohio Big Cities wire was separable and that offering it with the other three services in a "package" constituted a tying arrangement does not necessarily mean, however, that the arrangement automatically will be declared unlawful. Other essential elements of anti-trust violation also must be established. In *Northern Pacific Railway Co.* v. *United States*, *supra*, 356 U.S. 1, 6, the court said that tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. *International Salt Co.* v. *United States*, 332 U.S. 392. Cf. *United States* v. *Paramount Pictures*, 334 U.S. 131, 156-159; *United States* v. *Griffith*, 334 U.S. 100."

7) *Sufficient Economic Power*

We come now to the questions of whether AP had "sufficient economic power" with respect to its wire services to restrain free competition in the market for such services and whether a "not insubstantial" amount of interstate commerce is affected.

Appendix A

On the issue of whether AP possessed "sufficient economic power" with respect to its basic news services within the contemplation of the anti-trust decisions, we first emphasize its position of dominance in the field of news. In 1958 it was the largest single news service in the United States, with approximately 150 news bureaus and offices, and a staff of approximately 3500 staff members and employees in this country and foreign countries. Of the total of approximately 1750 English language daily newspapers in the United States, 69 per cent are AP members. In 1957 and 1958 the membership consisted of approximately 1250 regular members which were owners of newspapers, 275 of which were morning newspapers and 975 of which were afternoon newspapers, and approximately 1700 owners of radio and television stations. There were approximately twelve associate members which owned and published newspapers. AP members are located at every newspaper market in the United States. The newspapers of AP members cover at least 90 per cent of the nation's population area.

AP was described by the Supreme Court in *Associated Press v. United States, supra,* 326 U.S. 1, 18, as follows: "AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."

a) Uniqueness

The majority opinion of the Supreme Court in *Northern Pacific* is to the effect that uniqueness alone may establish "sufficient economic power." In *Loew's,* the Court held in a unanimous opinion that:

> "Market dominance—some power to control price and to exclude competition—is by no means the only test

> of whether the seller has the requisite economic power. Even absent a showing of market dominance, *the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.*" 371 U.S. at 45. (Emphasis supplied).

In *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc., supra,* 221 F. Supp. 848 (S.D. N.Y.), the Court held that the television program there involved "is of a unique nature sufficient to give ABC a leverage to gain economic power over the tying product." 221 F. Supp. at 850.

While a patent or copyright is no longer held to be an essential prerequisite to illegal tying arrangements, the monopoly created by a patent or copyright has been emphasized strongly in many opinions, including *United States* v. *Loew's Inc., supra:*

The evidence in this case demonstrates that AP asserts property rights in its news dispatches which are comparable to a copyright. In *International News Service* v. *Associated Press,* 248 U.S. 215, the Supreme Court held that AP has a quasi-property right in the news it gathers and distributes, as against a rival in the same business. The Court compared this interest to a common law copyright in a literary composition and held that it was not abandoned upon first publication.

Since prior to 1929 AP has required each newspaper using its news dispatches to print the following notice:

> "The AP is exclusively entitled to the use for reproduction of all news dispatches credited to it or not otherwise credited in this newspaper and also local news published therein."

An AP official testified that the purpose of this notice is to protect both AP and its members, warning that "anyone who gets a copy of a newspaper is not entitled to lift and sell the news" or reuse it in any way.

We, therefore, conclude that AP news dispatches not only are unique, but they possess a uniqueness "to suggest comparison with a monopoly by patent." *Northern Pacific Railway Co.* v. *United States, supra,* 356 U.S. 1, 19 (dissenting opinion).

b) Desirability of Tied Product

As stated in *Loew's, supra,* one test of "sufficient economic power" is the desirability of the tied product to purchaser. There can be no doubt of the desirability of AP's news wires to newspapers.

> "Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for these restrictions, might be published in the future." *Associated Press* v. *United States, supra,* 326 U.S. 1, 13.

Appellant found the Ohio Big Cities wire to be so desirable and indispensable to its requirements that, when AP refused to furnish it except when "tied to" three other wires, appellant continued to subscribe to and pay for all four wires, although it desired only the Ohio regional service and was experiencing a recurring operating deficit.

Both uniqueness and desirability having been established, it follows that "sufficient economic power" will be inferred. *United States* v. *Loew's Inc., supra,* 371 U.S. at 45.

8) *Effect on Interstate Commerce*

We come next to the question of whether a " 'not insubstantial' amount of interstate commerce is affected."

Northern Pacific Railway Co. v. *United States, supra,* 356 U.S. 1, 6.

The activities of AP are interstate commerce. *Associated Press* v. *N.L.R.B.*, 301 U.S. 103. AP's contract with appellant was a standard contract, which it required to be executed by all its members. The practice of tying news wire services together has been followed by AP continuously since 1935, when the separate "D" wire was first established. This tying practice has been a requirement that has continued with no variation. The newspaper circulation of members of AP at the 43 principal metropolitan trunk points in the United States comprises 94 per cent of the total circulation of all newspapers in these areas subscribing to news service agencies. They compromise 87 per cent of all subscribing newspapers in these areas. More daily newspapers throughout the nation subscribe to AP than to any other news service. In short AP is the chief source of news for the American press.

While there is no proof in this case as to precise percentages, there can be no doubt that the amount of commerce affected or restrained by the tying practice is substantial. *Standard Oil Co. of California* v. *United States, supra,* 337 U.S. 293; *International Salt Co.* v. *United States, supra,* 332 U.S. 392; *Osborn* v. *Sinclair Refining Co., supra,* 286 F.2d 832 (C.A. 4), cert. denied, 366 U.S. 963.

When appellant has established that a tying arrangement exists, coupled with "sufficient economic power to impose an appreciable restraint on free competition in the tied product" affecting a "not insubstantial" amount of interstate commerce, its defense under the Sherman Act does not require affirmative evidence of actual harm to competition or the extent of such harm. *Northern Pacific Railway Co.*

v. *United States, supra*, 356 U.S. 1, 12; *Standard Oil Co. of California* v. *United States, supra*, 337 U.S. 293, 305.

The impact of the tying arrangement upon competition is illustrated by the fact that if Times-Star had been permitted to drop the AP "D" (financial) wire as requested, it would have subscribed to the UPI financial wire. By adhering to its tying arrangement, AP precluded its competitor, UPI, from selling its financial wire to Times-Star, and prevented Times-Star from subscribing to a competing financial wire which it considered to be more desirable for its purposes.

In *International Salt*, the Court said: "[I]t is unreasonable, *per se*, to foreclose competitors from any substantial market" by means of tying arrangements. 332 U.S. at 396. In *Loew's*, the Court said:

> "Moreover, there can be no question in this case of the adverse effects on free competition resulting from appellants' illegal block booking contracts. Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations." 371 U.S. at 48, 49.

It is a reasonable conclusion under the evidence in this case that "a 'not insubstantial' amount of interstate commerce is affected."

9) *Illegality of Contract as Defense*

Finally, there is an ancillary proposition which should be discussed. Here appellant raises the question of the unlawfulness of the contract by way of defense. The Supreme Court has said: "As a defense to an action based on contract, the plea of illegality based on violation of the

Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold." *Kelly* v. *Kosuga*, 358 U.S. 516, 518. This holding is rooted in the principle that a party to an illegal contract cannot subsequently use this illegality to avoid his contractual obligations. The Court went on to note, however, that this view will not apply ". . . where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act. . . ." 358 U.S. at 520.

We do not construe *Kelley* v. *Kosuga, supra*, to preclude appellant from asserting Section 1 of the Sherman Act as a defense to the instant action for breach of contract. Appellant has paid for all AP services ever received by it. The Sherman Act is interposed as a defense, not to defeat an obligation for services received, but to avoid paying weekly assessments for two years after appellant had ceased publication of Times-Star and had sold its newspaper. Although a plea of illegality based on the Sherman Act is not favored in actions based on contracts, the statute by its express terms declares contracts in violation thereof to be illegal. 15 U.S.C. § 1. Illegality of the contract under the Sherman Act is a valid defense. *Bement* v. *National Harrow Co.*, 186 U.S. 70, 87, 88.

> "At an early date it was recognized that, despite the absence of a provision in the Sherman Act authorizing a defense of illegality in a private suit on a contract, such a defense might be used; that any one sued upon a contract may set up as a defense that it is a violation of anti-trust laws, and if found to be so, that fact will constitute a good defense to the action." 6 Toulmin's Anti-Trust Laws, § 18.3 (1951).

Having found a violation of Section 1 of the Sherman Act, this court will not enforce the contract by requiring appel-

lant to pay for two years of service it never received, and thereby enforce ". . . the precise conduct made unlawful by the Act . . ." 358 U.S. at 520.

10) *The Counterclaim*

We affirm the action of the district court in dismissing appellant's counterclaim, since the evidence of damages is too speculative to support the counterclaim. Judgments in anti-trust cases cannot be rendered on speculation or guesswork, even against a party who by his own wrong has precluded a more precise computation of damages. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264; *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 392 (C.A. 6), cert. denied, 372 U.S. 907.

The judgment of the District Court awarding damages against appellant is reversed and the case is remanded with instructions to dismiss the complaint.

O'SULLIVAN, Circuit Judge, dissenting. I regret my inability to agree with the learned, exhaustive and painstaking opinion of my brothers. The critical holding of such opinion is that, *as a matter of fact*, the variety of news furnished over AP's Ohio wire constitutes a commodity distinct and separate from the news furnished over its other wire services and that AP must, for a separate price and without purchase of other services, supply the Ohio wire to any member of AP who requests it. This the Associated Press must do under the majority's holding lest it stand convicted of violating Section 1 of the Sherman Act, 15 U.S.C.A. § 1, which provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. . . ."

Appendix A

Defendant-appellant, Taft-Ingalls Corporation,[1] as a publisher of the Cincinnati Times-Star had been a member of the Associated Press since the latter was formed in 1900. Under its contract in force with the AP at the times here involved, it had agreed as a member of AP to receive, use and pay for at a single price, the news brought to it by the three wires then employed by AP to distribute to its metropolitan city members news "of all kinds" gathered by AP's people domestically and worldwide. It seems fair to assume from the evidence that a metropolitan daily could not operate without receiving from some source all of the news that AP furnished over these three wires. The Cincinnati Times-Star also subscribed to some of the services of United Press International, the other major news gatherer, as did the publisher of the Cincinnati Post and Times-Star after the consolidation. The editor of the Cincinnati Post and Times-Star testified that even if he could have obtained the AP's general news A wire alone, he would not quit receiving the news provided by United Press and that a metropolitan daily could not operate with AP's A wire alone.

Preliminarily, I observe that the activities of the Associated Press, notwithstanding that it is a mutual membership organization, are subject to and can be found to violate the Sherman Act. *Associated Press* v. *United States*, 326 U.S. 1, 89 L.Ed. 2013 (1945). Yet I would like to pose at the outset the query whether the present case is properly susceptible to decision in terms of the classic "tying" analysis. The Supreme Court has made it clear that the inherent vice of tying arrangements is that they allow a seller to extend into one sphere a power developed in another

[1] Taft-Ingalls Corporation is the same corporation that published The Cincinnati Times-Star newspaper through a subsidiary, and its previous corporate name was The Cincinnati Times-Star Company. I shall refer to it herein as Times-Star.

sphere, thereby suppressing competition on the merits and taking unfair advantage of an otherwise legitimate market power. *E.g., Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 6 (1958). In my own mind, the inquiry into product separability is in the present case an awkward approach to the question whether AP has been guilty of wide-scale tying arrangements. A broad view of the record reveals that AP was created by newspapers as a mutual association for the purpose of gathering and disseminating to members as much news as rapidly and as accurately as possible. As it has developed, the costs of the enterprise are not assessed against members on the basis of the actual cost of delivering news to them; rather, each is assessed by a formula which seeks to determine the amount of benefit each member derives from the service rendered. AP's position may be seen as fundamentally the position that it should be allowed to admit only members who are willing to participate in, and bear their fair share of the cost of, this undertaking to provide comprehensive news coverage. I would prefer to deal with this position squarely, applying the rule of reason to the situation as it stands, instead of forcing analysis into the artificial "tying" mould in which the arrangement is per se illegal "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pac. Ry.* v. *United States*, *supra*, 356 U.S. 6.

Approaching AP's overall setup from general rule of reason analysis, I am persuaded that it is reasonable. There is no evidence whatever that members have been inveigled into undesired commitments by an extension of one form of power into an area where there is no power. Instead,

the present record shows only a situation where a rational and fair system of apportioning the costs of a mutual undertaking would be jeopardized, if not entirely defeated, by requiring the admission of members who do not wish to share in the entire enterprise. Assume for a moment that the Times-Star were admitted solely for the purpose of receiving news of Ohio events under compulsion of the majority's reasoning. Can any fair system be devised to allocate a fair share of AP's total costs to the Times-Star and other possible choosy members? Should AP be coerced into a difficult and arbitrary undertaking by interpreting the Sherman Act to find two or more products are here involved in a tying arrangement? Times-Star's own expert accountant, one Batzer,[2] readily admitted that he was unable to find any way to intelligently allocate to the Ohio Big Cities wire, if taken alone, a proper portion of the total cost of the AP basic news service. This, in my view, supports the trial court's finding of inseparability. To illustrate, may I hypothesize a single newsworthy event. AP's man in Cairo gets information that a prominent Cincinnatian is killed in Cairo, Egypt, together with other Cairo news of worldwide interest; he sends this bundle of news to the AP bureau in New York, and from there it goes to the AP bureau at Columbus on the B wire; the chief there picks off the item of the death of the Cincinnatian and sends it to Cincinnati on the Ohio wire. I pose the question, when does this news become a separate and distinct commodity? At Cairo, Egypt? Or was it converted to singularity at Columbus? If so, should a charge for the service be limited to some portion of the salary of the AP man at Columbus

[2] This witness' firm, Lybrand, Ross Brothers and Montgomery, engaged by Times-Star's counsel, sent ten or more of their people into the home office of AP as part of an attempted cost study in the hope, I assume, that it would be of significant support to Times-Star's case.

and the cost of the electronic channel between Columbus and Cincinnati? But who then is to pay for the services of the people who gathered and sent out the news from Cairo, and who is to pay for its handling in New York and how will these costs be apportioned? How will Cincinnati be separately assessed for a part of Cairo's costs for the rare day on which an event in Egypt has some special interest in Cincinnati?

Reference has been made to the claimed fact that United Press furnishes one or more wires for separate prices. The evidence on this is quite unclear. The United Press, unlike AP, is a corporation for profit, not a mutual association. The only evidence exhibiting a definite arrangement between a newspaper and United Press was its 1955 contract with Times-Star. This was quite similar to the AP contract and called for delivery of UP's "regular Day Trunk, Ohio State and Sports Report" for an unsegregated charge of "$600 per week during the first four years; $1,000 per week during the fifth year, and $1,300 per week thereafter."

My conclusion that AP's basic arrangement is reasonable in its basic nature can be further supported by attempting to fit the present case into the terms of conventional tying analysis, a task to which I now turn.

1) *Separability.*

The tying arrangements first considered to violate the Sherman Act were those where a patentee sought to extend his patent monopoly by refusing to sell the product of his patent without an unpatented item. *International Salt Co.* v. *United States*, 332 U.S. 392, 92 L. Ed. 20 (1947). As the law has developed, however, the tying product need not have patent monopoly to condemn its use to control other tied products. *Northern Pac. R. Co.* v. *United States*, 356

U.S. 1, 9 (1958). But to establish such illegality, it is essential that the tied and the tying products be *separable* and *different*. "For our purposes a tying arrangement may be defined as an agreement by a party to sell *one product*, but only on the condition that the buyer also purchases a *different* (or tied) product. . . ." *Northern Pac. Ry.* v. *United States, supra*, 356 U.S. 5. (Emphasis supplied.) The defendant-appellant, relying on a charge of illegality to avoid liability for breach of its contract, had the burden of proving such illegality. *Palmer* v. *Chamberlin*, 191 F(2) 532 (CA 5, 1951); *Illinois Surety Co.* v. *O'Brien*, 223 Fed. 933 (CA 6, 1915). Whether the news items of all kinds that were of especial interest to Ohio readers were different products than the general news items of all kinds which were also of interest to the readers of the Cincinnati Times-Star was a *question of fact*. The District Judge found that defendant-appellant had failed to meet its burden of proving *as a matter of fact* the separability necessary to taint the contract with illegality. Recognizing that such ruling was a finding of fact, my brothers, in reversing the District Judge, conclude as required by Rule 52(a) F.R.C. Proc. that such finding was clearly erroneous. I cannot avoid the conclusion that the District Judge's holding that appellant had failed to prove such essential fact was not only not clearly erroneous, but was in my view clearly correct.

In support of my view, I recite what I believe is a fair summary of the evidence from which the essential facts had to be found. It was from the awareness of its charter members that acquisition and publication of news could better be accomplished through mutual efforts that the Associated Press had its beginnings in 1900. The record does not clearly disclose just what methods and instruments were

initially employed to reciprocally exchange news for publication. The Morse code was early used and we may assume that telegraph was the customary means. With the developments that followed telegraph, telephone and wireless came into use. The information making up the news is actually conveyed by instrumentalities provided by the American Telephone & Telegraph and the Western Union. The word "wire" came to be used to identify what was referred to in the testimony as an electronic channel, not necessarily a physical wire. It is clear that the use of the several so-called "wires" did not at all come about as an effort by a manufacturer of several products to increase control of a market by tying one product to another. To the contrary, the use of several channels came about as the volume of the news increased and it was found inefficient to carry all the news on one channel. With several channels available, each was devoted primarily to one general type of news—top national and international news on A, financial or business news on D, and local interest news on S (Ohio Big Cities in the present case, although we may assume that a similar S wire was provided for other regions as well). Notwithstanding this general classification, the evidence showed that news items outside of the respective classification were, consistent with varying load problems, carried on each of the wires. The reason for this is illustrated by the starting of the D wire about 1934. Up to then the financial and business news was sent over the A wire and a parallel wire called B, but it was found that these facilities were not adequate to expeditiously deliver the financial and business news with the other general news and at the request and with the consent of the AP members, a D wire was established to pick up the financial news separately between 10:00 A.M. and 6:00 P.M. and get it out promptly to the

members. During and prior to the times here involved, however, there was no D wire distributing financial and business news to members west of Kansas City. Such news was, and apparently continues to be, carried on the A wire and a so-called B wire, neither of which carry the financial news separately. It was shown also that the use of three wires was limited to the metropolitan dailies and that a condensation of all of the news on the A, B, D and S wires went on a single circuit to smaller city papers that did not need the same volume as the metropolitan papers. The function of the B wire is not entirely clear from the evidence, although it seems to have been a wire parallel to the A wire and also to have been used for direct exchange of news between the AP members. There was evidence that out of the general news coming into an AP bureau at Columbus on the B wire, the chief of that bureau, on his evaluation, would take out dispatches of special news interest to the Ohio papers and run them on the S or Ohio Big Cities wire. There was much evidence of overlapping on all wires and each at times, according to the general load; carried news unrelated to its general classification or news that partook of several classifications.[3] The following footnote recitation in the District Judge's opinion partially covers the evidence.

> "The term 'trunk' as used in this opinion, designates mechanical reproduction of news print. The actual transmission may be carried by wire or by wireless. The news gathered by the Associated Press is trans-

[3] The majority opinion quotes from a stipulation describing the news classifications carried over the respective wires. Immediately following the quoted portion, the stipulation provides, "Additional evidence about these circuits and about the AP's leased wire news service to its members will be presented at the trial." The District Judge made his decision from the entire record.

mitted to all members by means of leased wire circuits and electronic facilities. The technical method by which the news is transmitted has no bearing on the legal conclusion herein.

"News originating in the United States is not transmitted to a single control point for transmission, but is transmitted to the members of The Associated Press directly from the news bureau of The Associated Press in the area in which the news originates. News originating abroad is transmitted to the offices of The Associated Press in New York from which it is transmitted to all points in the United States. Newspapers in metropolitan cities require a greater volume of news than newspapers in small cities. The leased wire news service furnished by The Associated Press to newspapers in small cities is transmitted over a single circuit. The leased wire news service furnished by The Associated Press to newspapers in metropolitan cities is transmitted over multiple circuits. *These multiple circuits, commonly called trunks, have come into existence because, under present technology, it is impossible to transmit all state, national, and international news on one circuit.* As previously mentioned, the leased wire news service furnished by The Associated Press to newspapers in metropolitan cities east of the Mississippi River and north of the Mason-Dixon line is transmitted to such newspapers over circuits designated as A, D, and S trunks. The A circuit operates 24 hours a day and carries news of top national and international importance. The D circuit operates from 10 a.m. to 6 p.m., New York time, Monday through Saturday, and carries financial and business news, market quotations and general news which cannot be accommodated on the A circuit. The S circuit is a regional circuit. In Ohio, the S circuit is known as the Ohio Big Cities wire and carries news of regional interest in Ohio and general news originating elsewhere that cannot be accommodated on the A circuit.

Appendix A

The B circuit parallels the A circuit from New York to Kansas City and supplements the A circuit. General news of interest in Ohio is taken from the B circuit at Columbus and relayed to newspapers in Ohio on the S circuit, or Ohio Big Cities wire. At Cincinnati, the B circuit is used exclusively for the transmission of news out of Cincinnati.

"In the years 1934 and 1935, the volume of news transmitted to afternoon newspapers in metropolitan cities became so great, the A and B circuits were inadequate. The Associated Press sought the views of the members affected as to whether a new facility should be established. With the assent of all members affected, the D wire facility was established. Commencing in 1935, the news which was theretofore transmitted to the Cincinnati Times-Star over the B circuit was transmitted over the D circuit." (Emphasis supplied.)

The evidence offered small help in measuring and separating into identifiable compartments AP's vast total funcitons of world-wide news gathering and distribution. It impresses me that the intricacies and complexities involved may make it impossible to offer any evidence for reliably dividing into separate and distinct products or articles the incorporeal thing called news. There was no evidence which would permit easy separation into neat divisions of the *gathering* of information of the infinite variety of events that go to make up the news. I agree with my brothers that the fact that the Associated Press did not, and in my view likely could not, allocate to each one of its wire facilities a defined share of its total costs does not by itself foreclose a finding of illegal conduct. However, the obvious difficulty and perhaps impossibility of making any such cost division that would be reliable is, I believe, relevant to and supportive of the District Judge's finding of fact that appellant failed to prove its case of separability and

distinctness. To be sure, the District Judge emphasized that appellant had "failed to provide this court with sufficient facts upon which it may be concluded that there is a natural division in the cost of gathering news transmitted over the A, D and State trunks," and further said "without such a complete division, it is unnecessary and futile to explore the other elements of the alleged tying agreement." He also said, however, "Recognition must be made that the compulsory joining of two separate and distinct things is a fundamental prerequisite of an illegal tie sale situation. . . . Defendant has not presented sufficient evidence of separability." I read his whole opinion as a finding that appellant's proofs did not establish as a matter of fact that AP's several wire services—electronic channels—were separate and distinct products.

It seems to me that it would require excessive subtlety and subjective evaluation to break down into various components the tangled skein of human events called news so as to be able to say, as a fact, that information as to certain events separated by time or physical distance or by the degree of interest it excites in one place and not in another, or by the different persons whose conduct make up the newsworthy events, can be divided so as to be identified as distinct and separate products. Is the knowledge of each of the myriad events that make up the news a separate product, or are separate products to be identified by the means chosen for transmission? Much speculation can be indulged in coming to a factual answer to the involved question of separability. I cannot convince myself that news of the death of the governor of Ohio is a different product than news of the death of the governor of Illinois, any more than news of the resignation of the Mayor of Cincinnati is a different product than news of the resigna-

tion of the Mayor of Cleveland or of Dayton, Ohio. I do not think that like products can be made unlike by the vehicles chosen for their delivery to the user. The fact that the AP made some broad classifications of its total news so as to deliver it more speedily and efficiently does not in my view immediately convert these classifications into separate and distinct products. Small newspapers received the news of all kinds over one wire. Could one of these newspapers, having a contract to receive such news for a given price and for a fixed period, demand that AP fix a separate price for the society news and being denied, refuse performance of its contract? It seems to me that material to the factual question involved is that all of the members of the AP have at all times agreed to share by way of assessments the cost of getting the "leased wire news service of The Associated Press." That was the subject matter of appellant's contract with AP and such contract made no breakdown of such service into different kinds of news. There is no showing in the record that prior to appellant's request in 1957, any publisher of any metropolitan newspaper or anyone else ever requested delivery of anything less than what was the "wire news service of the Associated Press" even though, as the system developed, separate electronic channels were employed to deliver two classifications out of the whole for more speedy and efficient delivery. Each metropolitan paper used all of this news and it was testified that all of it was essential to the publishing of such a paper. These circumstances bespeak a recognition of the lack of separability of the news provided by AP and should be weighed upon the factual issue of separability.

I am not convinced that the fact that AP offered to the E. W. Scripps Company to eliminate the so-called Kentucky

wire and reduce the total assessment by some $240.00 proves the separability of the A, D and S wires. The record is clear that the latter were always considered as together making up the AP's basic service. It appears that the so-called Kentucky wire was furnished under a separate contract made on the same day as the contract in suit, August 4, 1948, and it was between AP and the Cincinnati Times-Star Company *of Covington, Kentucky.* The contract in suit was between AP and the Cincinnati Times-Star Company of *Cincinnati, Ohio.* The record is unclear as to the reason for this and in any event does not permit us to give significance to the offer made to the Scripps people to furnish the basic service for Cincinnati without any assessment for a Kentucky wire. The proposal to drop this service for the combined paper proves no more in the present context than the undoubted fact that metropolitan newspapers which do not receive the Kentucky wire may be found all over the country. No comparison was offered to show that the operations of the combined paper were such that the Kentucky service should be included in its assessment for whatever reasons made it fair to assess Times-Star but not a New York newspaper for its costs. Thus this incident illustrates only one application of AP's assessment formula, geared to estimated needs and benefits, and leaves the record entirely devoid of any attempt to prove the slightest connection between the proposed reduction and the cost of providing the Kentucky wire.

In *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614, 97 L. Ed. 1277, 1293 (1953), the Supreme Court said:

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a *second distinct commodity* with the desired purchase of a domi-

> nant 'tying' product, resulting in economic harm to competition in the 'tied' market." (Emphasis supplied.)

In *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5, the Court said:

> "For our purposes, a tying arrangement may be defined as an agreement by a party to sell one product *but only on the condition* that the buyer also purchases *a different* (or tied) *product*. . . ." (Emphasis supplied.)

In the cases which have developed the rule declaring tying arrangements illegal under the Sherman and Clayton Act, the tying products usually have had physical and corporeal existence distinct and different from the so-called tied products. *E.g.*, *International Salt Co.* v. *United States*, 332 U.S. 392, 92 L. Ed. 20 (1947); *Northern Pac. Ry.* v. *United States*, *supra*. In the block booking cases, the tying products were separate and distinct products, moving pictures, each complete in itself; each "in itself a unique product," having physical being and usable alone without aid or supplementation by any other moving picture films, the tied products. *United States* v. *Loew's, Inc.*, 371 U.S. 38, 47-48 (1962).

I think it appropriate to emphasize here that this Court is not at liberty to make findings of fact or to draw final inferences of fact simply upon its own evaluation of the evidence. *Commissioner* v. *Duberstein*, 363 U.S. 279 (1959). Conceding that the issue of separability is one of fact, and being aware of this restriction, my brothers find clearly erroneous the District Judge's factfinding. Rule 52(a).

In none of the cases relied upon by the majority has an appellate court set aside as clearly erroneous a District Court's finding of fact. *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pac. R.R.* v. *United States*, 356 U.S. 1 (1958); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). In each of these cases it was the District Judge who made the finding of fact—the appellate court sustained such finding. And *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848 (S.D. N.Y. 1963), also relied upon by the majority, involves no evidentiary findings of fact whatever, for the court was concerned only with a motion to dismiss the complaint. I am unaware of any case where an appellate court has found clearly erroneous a finding of fact involving such nuances of meaning and such delicate appraisal and balancing as were involved in determining whether each news "wire" represented a "separate and distinct product."

2) *Illegality as defense to breach of contract.*

It should be kept in mind that the contract sued upon did not by its terms or by its negotiation involve any compulsion. Except for possible inferences to be drawn from "the recitals in the Minutes of a single AP Board meeting,[*] there is no showing that prior to the Times-Star effort in 1957 either Times-Star or any other AP member actually

[*] "Mr. Cooper advised the Board that four members served on the Pacific Northwest trunk circuit desired to discontinue the wire facilities for the financial tabular service and that three members opposed such discontinuance.

"W. H. Cowles stated that the Spokesman-Review and Spokane Daily Chronicle would consent to discontinuance of the tabular wire, if all members concerned came to an agreement to substitute therefor a reduced stock market report to be carried on the regular Associated Press news wire.

requested that AP provide anything less than its "leased wire service" which Times-Star contracted to take in its contract of 1948. On the contrary, explanation of the impracticability of separation satisfied any inquiry on the subject.[5] Apparently, no member of AP considered that what it was getting through its contract and membership was made up of distinct products which might be separately desired or used. The whole enterprise was a mutual plan. No reading of the standard AP contract and its by-laws will exhibit an exposed or hidden plan that any separable part of its service was to be provided *on the condition* that some other part be accepted and paid for. There is no hint of "a forced purchase of a second distinct commodity," *Times-Picayune Publishing Co.* v. *United States, supra*, or the sale of one product "Only on the condition that the buyer also purchases a different . . . product," *Northern Pac. Ry. Co.* v. *United States, supra.* The contract sued upon and its negotiation were entirely free of any element of compulsion,[6] and there is nothing in the entire record of this case to suggest that the multiplication of AP's channels for distributing the news reflects "the use of economic power in one market to restrict competition on the merits in another . . ." condemned by the

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"The Board voted that inasmuch as the tabular service had always been an integral part of the basic news report, which should not be permitted to disintegrate and inasmuch as assessment reductions had been given for the local element where requested for discontinuance, the present arrangements be continued until the members concerned unanimously agreed otherwise." (Apparently about 1943.)

[5] An AP executive testified that ". . . over the years it has been discussed and after an explanation of the impracticability of attempting to deliver a news report on one of several trunk wires, there has not been, to my knowledge, a request for one."

[6] Times-Star's position in this regard is emphasized by the following colloquy between the District Judge and Times-Star's counsel:

Court: ". . . there was absolutely no evidence whatever that there was—that it [the contract] was entered into under a complaint."

Counsel: "We don't have to show that, I want that understood, that is basic."

Court in *Northern Pacific* as "the vice of tying arrangements." 356 U.S. 11 (Emphasis supplied.) Even in September of 1957, Times-Star's first request was not to get the Ohio Big Cities wire for a separate price, but merely to get a reduction in its assessment for receiving the *total* AP service.[7] This, of course, could only be accomplished by discriminating against all members of AP by having them assume part of Times-Star's assessment. Only when this was refused did Times-Star seek to have AP deliver the news coming over the Ohio wire alone. I find it difficult to understand how a contract without taint when made can be converted to complete illegality during its term by a request for total or partial release from its valid obligations. I respectfully assert that while the facts involved were not identical with those in the case at bar the Supreme Court's decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), supports my view in this regard. With its preliminary observation that "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court," 358 U.S. 518, the Court held that a purchaser who had been receiving the fruits of a contract could not thereafter refuse to fulfill it. In that case Kelly had agreed to purchase 50 cars of onions under a contract which he claimed to have an illegal purpose to fix and control the price of onions. Kelly accepted delivery of 13 cars but refused to take the balance. The seller sued for damages accruing from Kelly's nonperformance of his unfulfilled promises. It is significant that Kelly *had not received or used* the onions which were the subject of the suit. The Supreme Court affirmed the Seventh Circuit decision which had sustained

[7] As far as this record discloses, a contention that AP's plan of operation was an illegal tying arrangement made its first appearance in Times-Star's pleadings after it was sued for breach of contract.

the action of the District Court in striking the pleaded defense of illegality. *Kosuga* v. *Kelly*, 257 F(2) 48 (CA 7, 1958). The Supreme Court said:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general." 358 U.S. 520.

I would like further to cite here what the Supreme Court in *Kelly* v. *Kosuga* quoted with approval from *McMullen* v. *Hoffman*, 174 U.S. 639, 669, 43 L. Ed. 1117, 1129 (1899).

> "It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions."

The action against Kelly was not for the price of onions which he had received and used, but was for damages for failure to take the undelivered portion of the total agreed to be purchased. In the case at bar Times-Star had, under its contract of August 4, 1948, received all of the services covered by the contract up to July of 1958. It had agreed to continue to receive and pay for these services until it terminated its contract by a two-year notice. The action here is to recover the loss resulting to AP from Times-Star's refusal to receive and pay for their news service during the two years following notice of termination. To enforce such a contract against a willing buyer who freely entered into it without questioning whether a lesser contract could be made seems here, even more than in *Kelly* v. *Kosuga*, to

be but to enforce "a lawful sale for a fair consideration [which] constitutes an intelligible economic transaction in itself. . . ." 358 U.S. 521.

With respect, I state my belief that the majority have misconstrued a basic issue when they characterize the AP practice as "this AP policy and practice of 'tying' four wire services together in a single 'package' and *requiring* that appellant take and pay for four wire services in order to receive one of them. . . ." There is no evidence that Times-Star even suggested, let alone requested, that it be permitted to take anything different from, or less than, AP's entire basic news service during all the years it continued as a member of AP, much less in 1948 when it entered into the contract sued upon. Even when beset by financial difficulties, the record makes it clear that Times-Star's first thought was to get a reduced assessment for the entire AP basic service, and that reduction of service was sought only after it was made clear no lower assessment could be had. In several places my brothers characterize AP's activities as requiring Times-Star "*to continue to subscribe* and pay for three wires which appellant did not want and need." (Emphasis supplied.) On the contrary, AP merely insisted that Times-Star perform its contract made at a time in 1948 when Times-Star obviously did want and need the AP basic news service. AP did not, in 1957, require Times-Star to "continue to subscribe" for the wires it then decided it would prefer not to take. Times-Star had already subscribed for this service and had received all of the consideration due under its contract. AP merely refused to consent to its breach—no reason appears in the record why Times-Star could not then have given the required two years' notice.

The majority places reliance on *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962). May I point out that *Loew's* as well as *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, and *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam* 365 U.S. 567 (1961), also relied on, were cases involving government action to enjoin practices or contracts requiring that a "distinct commodity" be taken *as a condition* to obtaining the more desired "tying" product. Indeed, in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159, 92 L. Ed. 1260, 1293 (1948), the Supreme Court said,

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."

None of these cases involved breach of contract actions and I think that Mr. Justice Brennan's opinion in *Kelly* v. *Kosuga*, *supra*, makes clear the distinction that should be made here. My brothers, asserting that even though voluntarily made, the AP-Times-Star 1948 contract will not save the plaintiff's judgment here, quote from *Loew's* that "the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by *contractual obligations*. . . . *Contractual obligations* cannot thus supersede statutory imperatives." 371 U. S. 51. (Emphasis supplied.) The quoted language is misapplied. The "contractual obligations" there being discussed did not at all relate to a contract between a supplier and a purchaser, as AP and Times-Star, but involved instead a supplier's claim that its "contractual obligations" *to a third party* required it to enter into the tying arrangement under attack by the government.

Appendix A

It impresses me that if there is now a question whether the Associated Press has by its practices become a danger to the free competition sought to be protected by the anti-trust laws, the question would better be resolved by Congressional action or by a frontal attack by the Department of Justice. I find no illegality in the contract before us and thus cannot join in permitting appellant to employ the anti-trust laws to escape obligations voluntarily assumed in a contract which, when made, expressed the bargain it then desired for itself.

I pose the question whether under the majority opinion any member of the Associated Press can legally repudiate its obligations by making and being refused a demand that henceforth it be supplied only, and separately, with the society news, or foreign news, or political news, or news of the British Commonwealth or the European Common Market. If AP's present practices were indeed illegal tying schemes, and in my view they are not, such a rearrangement of the entire Associated Press method of gathering and distributing the news and assessing its costs will be necessary. But I find it difficult to understand why there should be added the chaos of a transition period where none of the present contractual arrangements can be relied upon. If the manufacturer of Chevrolet automobiles had a contract to sell ten of its Chevrolets per month for a stated period to a purchaser, could the purchaser convert the contract into an illegal tying arrangement by demanding that for the balance of the contract term it be allowed to purchase only the steering mechanism for a separate price so as to use the latter in assembled automobiles designed by the purchaser? I doubt it, even though the steering mechanism is manufactured in a separate facility and easily deliverable by itself.

The majority opinion affirms the District Judge's dismissal of appellant's counterclaim for damages under the antitrust laws because the proofs of damages were too speculative for an award thereof. My above views quite obviously put me in agreement with the majority on the disposition of this issue.

3) *Other contract defenses.*

Because of its holding that illegality bars plaintiff's recovery, the majority opinion did not deal with other defenses asserted by appellant. These included claims that under its contract and the by-laws of the Associated Press appellant's liability ceased when it was no longer publisher of the Cincinnati Times-Star and that plaintiff AP had suffered no recoverable damages by appellant's conduct.

a) *Discontinuance of publication.* The Cincinnati Times-Star continued as a daily newspaper after its assets were transferred to E. W. Scripps Company, owners of the Cincinnati Post, in a daily paper called the Cincinnati Post and Times-Star. The contract in question provided that it would continue in force "until terminated by the Member upon two years' notice, in writing, by registered mail to the Associated Press of the Member's election to do so." The contract also provided that "The provisions hereof and the By-laws of The Associated Press constitute the whole agreement between the parties hereto." A by-law provided,

> "Sec. 13. In case (a) a regular member shall cease to be the owner of the newspaper described in his or its contract with the Corporation, or (b) a newspaper represented by regular membership shall cease regular publication, the membership shall automatically, and without action by the Corporation, become an associate membership."

The quoted by-law does not provide, nor was there any evidence, that becoming an "associate membership" terminated the contract or excused the giving of the two year notice of termination. There was a further provision of the contract that

> "Upon the sale or transfer of the business of the Member to which this agreement relates, the Member shall cause the Member's successor to agree in writing to fulfill the terms and conditions of this agreement during the term hereof and to apply for membership in the Associated Press in the same class as the Member."

The Times-Star did neither of the acts which would have terminated its liability—giving notice or having a successor assume its liability—and clearly breached its contract. It offered evidence, objection to some of which was sustained, to show various instances where the Associated Press had not enforced the two year notice provision against members who had gone out of business. The circumstances of these cases were not shown to have been the same as the transaction whereby the Times-Star paper was sold to Scripps for $3,710,000. But in any event forbearance from enforcing its contract with others did not foreclose AP's insistence on its contract rights against appellant.

b) *Recoverable damages.* Appellant urged that AP failed to prove its damages. It is not disputed that when Times-Star discontinued payment of its weekly assessments such revenue was lost to AP. Appellant offered evidence that during the two year period involved AP obtained new revenue in excess of the total assessments payable by Times-Star during such period by increasing its membership through the additions of radio stations and other media. Such additional revenue, however, did not take the place

of the loss accruing from appellant's refusal to pay. The evidence also showed that during the entire period involved AP had a deficit and that notwithstanding revenue from new members it had a net operating deficit in the approximate sum of $600,000. The District Judge spoke on this subject as follows:

> "Under the by-laws of Plaintiff, it can recoup losses of revenue from other members in The Association by use of its assessment formula. First, an actual loss is sustained by Plaintiff when a newspaper discontinues it news services without paying its contractual obligations. The Plaintiff corporation, being a non-profit corporation, then finds it necessary to meet its expenses through an increased assessment of the membership. Whatever losses the corporation incurs for any reasons must be assessed to the membership. The members, through the increased assessment, do not eliminate the loss, they only subsidize the corporation. Thus Plaintiff sustained a real loss when Defendant cancelled the contract."

I consider that the Associated Press' method of obtaining needed revenue by a formula for assessing its members is not unlike a utility's recovery of its costs by spreading rates among the users of its power. In *City of Memphis* v. *Ford Motor Co.*, 304 F(2) 845 (CA 6, 1962) we held that the minimum monthly rate that Ford Motor had agreed to pay for a fixed period was recoverable in full upon Ford's breach of contract, even though the Memphis utility was not required thereafter to generate and deliver the power contracted for by Ford.

I would affirm the judgment of the District Court.

APPENDIX B

SHERMAN ACT § 1 (15 U.S.C. § 1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding

fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT § 4 (15 U.S.C. § 15):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX C

Most of the AP's costs of providing the basic news wires are *common costs*. The rest of the costs are general and administrative costs. On the assumption that the total of such costs equals the total assessment for the basic news wires, the problem was to break down the assessment among the four news wires comprising the basic news wire service to *The Cincinnati Times-Star*. Since the AP itself set a price for the Kentucky wire, Petitioner's qualified expert, Kirk Batzer, subtracted that price from the basic assessment of The Cincinnati Times-Star to arrive at the net basic assessment to be divided or broken down among the remaining three news wires, as follows:

Basic weekly assessment of *The Cincinnati Times-Star* for four basic news wires	$1,558.05
Less price of Kentucky wire	240.60
Net basic assessment to be broken down among three wires	$1,317.45

1. The common costs were those appearing in the Statement of Expenses of the AP for 1958 (Schedule A *):

   (n) Domestic news
   (o) Foreign news
   (p) News distribution
   (ab) State service

2. The so-called general and administrative costs were those appearing in Schedule A, as follows:

   (q) Membership
   (r) Corporate (B of D)
   (s) General administrative
   (t) Employee benefits

* The schedules referred to herein are those attached to D. Ex. 54 at R. 535a-40a.

Appendix C

3. Considering the nature of the problem, the first step of Mr. Batzer was to segregate all costs of AP incurred in furnishing the three basic news services.
   a) Isolate those costs in 1 above (Col. 2 of Schedule C).
   b) Allocate proper proportion of those costs in 2 above (Col. 4 of Schedule C).

4. These total costs of the basic services were then broken down between news gathering costs (58.17%) and news distribution costs (41.83%)—see Schedule D.
   a) And the total assessment of $1,317.45 was broken down accordingly into:

News gathering costs	$ 766.36	(58.17%)
News distribution costs	551.09	(41.83%)
Total Assessment	$1,317.45	(100%)

5. To allocate *news distribution costs* ($551.09) among the three wires, a sampling of the number of lines of copy moving over the wires to Cincinnati was made (Schedule E). This indicated that the allocation would be as follows:

	% of Copy	*News Distribution Costs*
A wire	56.14%	$309.48
D wire	14.60	80.46
Ohio Big Cities wire	29.26	161.25
	100.00%	
Total News Distribution Costs		$551.09

6. To allocate *news gathering costs* ($766.36) among the three wires, such costs were first divided between domestic news and foreign news because there is a significant difference, as follows (based on percentages shown in Schedule D):

Appendix C

	Percentages of Total Costs in Schedule D	*Breakdown*
Domestic News	45.15%	$594.83
Foreign News	13.02	171.53
	58.17%	
Total News Gathering Costs		$766.36

A sampling of the number of lines of copy moving over wires to Cincinnati showed the percentage of stories originating abroad and the percentage of stories originating at home to be:

	Percentages of Total Originating at Home	*Percentages of Total Originating Abroad*
A wire	48.6 %	92.06%
D wire	16.91	3.6
Ohio Big Cities wire ..	34.49	4.34
	100.00%	100.00%

Following these percentages, the *news gathering costs* ($766.36) were divided into foreign costs and domestic costs for the three wires, as follows:

	Domestic Costs		*Foreign Costs*		*Total*
A wire	$289.09	(48.6 %)	$157.91	(92.06%)	$447.00
D wire	100.59	(16.91%)	6.18	(3.6 %)	106.77
Ohio Big Cities wire	205.15	(34.49%)	7.44	(4.34%)	212.59
	$594.83	(100%)	$171.53	(100%)	$766.36

7. Combining the *news distribution costs* for the three wires, as above determined, with the *news gathering costs* for the three wires, as above determined, Mr. Batzer arrived at an allocation of the basic assessment among the four wires, as follows:

Appendix C

	News Gathering	*News Distribution*	*Total*
A wire	$447.00	$309.38	$756.38
D wire	106.77	80.46	187.23
Ohio Big Cities wire	212.59	161.25	373.84
	$766.36	$551.09	$1,317.45
Kentucky wire assessment			240.60
Total Assessment			$1,558.05
Less assessement for Ohio Big Cities wire			373.84
Total Excess Weekly Assessment paid by Times-Star			$1,184.21*

* For reasons stated on page 6 of Petitioner's Brief, the figure is $1,108.42 for the period from September 16, 1957 through December 14, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 183

THE ASSOCIATED PRESS,

Petitioner,

v.

TAFT-INGALLS CORPORATION,
formerly known as THE CINCINNATI
TIMES-STAR COMPANY, an Ohio Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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CINCINNATI, OHIO

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court has not been reported. It is printed in the Petition at pages 60a-69a, as Appendix B. The opinion of the Court of Appeals for the Sixth Circuit is reported in 340 F.2d 753 and is appended to the Petition at pages 1a-59a, as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the requirement of The Associated Press ("AP") that The Cincinnati Times-Star Company ("Times-Star") receive and pay for its "A," "D" and Kentucky State wires which Times-Star did not want or need, in order to receive the Ohio Big Cities wire which Times-Star did want and need, and which requirement forced Times-Star to give up its independent judgment in determining whether to subscribe to the three unwanted and unneeded news services, constituted a tie-in arrangement in violation of the antitrust laws?

2. Did the Court of Appeals err in finding that the Ohio Big Cities wire of AP was separable and distinct from its "A," "D" and Kentucky State wires?

STATUTES INVOLVED

The statutes involved are the Sherman Act, Sections 1 and 2 as amended, 15 U.S.C. §§ 1 and 2, Act of July 2, 1890, chapter 647, §§ 1 and 2, 26 Stat. 209; Act of August 17, 1937, chapter 690, Title VIII, 50 Stat. 693; Act of July 7, 1955, chapter 281, 69 Stat. 282; and Sections 3 and 4 of the Clayton Act, 15 U.S.C. §§ 14 and 15; Act of October 15, 1914, chapter 323, §§ 3 and 4, 38 Stat. 731. The texts of these statutes are set forth in the Petition at pages 74a-76a, as Appendix F.

STATEMENT OF THE CASE

Times-Star was an Ohio corporation which for many years published an evening daily newspaper at Cincinnati

called *The Cincinnati Times-Star*. On July 19, 1958, publication was discontinued and some of its assets were sold to The E. W. Scripps Company ("Scripps") publisher of the other Cincinnati evening newspaper (Par. 10 of Stipulation, P. Ex. 7; R. 92a, 418a at 420a-21a, 424a-25a; R. 94a-95a).* AP is a "mutual and cooperative" non-profit membership corporation that was organized in 1900 under the Membership Corporation Law of New York (By-Laws, Article I, P. Ex. 6; R. 393a at 398a-99a). It is engaged in the gathering of "all kinds of news" (By-Laws, Article I, P. Ex. 6; R. 393a at 393a-99a) through its own instrumentalities and from its members, and in furnishing of such news to its members for publication (Par. 2 of Stipulation, P. Ex. 7; R. 92a, 418a at 419a). Times-Star was a member of AP (Par. 11 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a).

Underlying the entire controversy in this case is the established practice of AP going back to 1935 when member newspapers in forty-three (43) metropolitan areas in the United States, including Cincinnati, Ohio, were *required* by AP to take a package of basic news wire services (R. 156a-57a, 207a, 214a-15a). These areas make up the major newspaper markets in the United States (D. Ex. 31; R. 220a, 462a; D. Ex. 47; R. 292a, 511a), and are considered by AP to be "trunk points" (D. Ex. 31; R. 220a, 462a; R. 156a-57a, 207a, 214a-15a). A member which publishes a newspaper in any of these metropolitan areas or trunk points *must agree* to receive and pay for certain trunk circuits and an AP regional or state circuit (R. 128a-30a, 155a-56a, 163a, 212a-14a, 238a, 240a, 280a). With respect to trunk points east of Kansas City and north of the Mason-

* P. Ex. is Petitioner's (AP) Exhibit; D. Ex. is Respondent's (Times-Star) Exhibit; Exhibits are attached as part of Respondent's Appendix in the court below (Volume 3 of the Certified Record) filed with the Petition. All record citations (R. ...) are to pages in Respondent's Appendix in the court below (Volume 3 of the Certified Record).

Dixon line, the AP news services consist of (1) the "A" trunk circuit, carrying top bulletin news of general interest, (2) the "D" trunk circuit, carrying financial and business news and commodity quotations, and (3) the applicable state or multiple-state big cities circuit or circuits carrying state and regional news (R. 160a, 214a-15a, 280a; D. Ex. 41; R. 289a, 497a-98a; D. Ex. 42; R. 244a, 501a-02a). AP's "D" trunk circuit does not run west of Kansas City or Sioux City, Iowa (R. 212a). In the western part of the United States, newspapers located at trunk points must receive and pay for two news services of the AP, the "A" trunk circuit, and the applicable state or multiple-state circuit (R. 157a-60a).

Any member of AP located in a trunk point city may not subscribe to less than all of the AP wire circuits comprising AP's leased wire news service at the particular trunk point (D. Ex. 41; R. 289a, 497a-98a, R. 128a-30a). This has been AP's policy "from the time of the organization of the AP" (R. 130a).

A member of AP which is located in a rural area or in a city which is *not* a trunk point must receive a composite of news sent out by AP on a single circuit, which comprises its leased wire news service for such places (R. 129a, 165a-68a, 215a-16a). In some cases such members may also receive, in addition to the single circuit, but on an optional basis, one or more of the other AP circuits furnished to members at trunk points (R. 166a-68a).

Following the adoption of extensive amendments to the By-Laws of the AP in 1945, the Board of Directors of AP in 1946 prescribed a standard form of Agreement to be signed by each member (Par. 9 of Stipulation, P. Ex. 7; R. 92a, 418a at 420a; Art. II, Sec. 8, P. Ex. 6; R. 393a at 401a). On August 4, 1948, pursuant to the mandate of a new By-Law to all members of AP, Times-Star signed an

Agreement with AP on its standard form (P. Ex. 4; R. 65a, 390a). This Agreement provided, among other things, that AP would provide a "leased wire news service" to Times-Star. This leased wire news service consisted of a "package" of services including the "A" trunk circuit, the "D" trunk circuit and the Ohio Big Cities circuit, also known as the "S" trunk circuit (Par. 13 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a-23a). In addition, AP's leased wire news service for Times-Star included the Kentucky State wire circuit containing state news of interest to Kentucky readers (R. 157a, 205a).

Each of the wire circuits of AP is functionally and operationally separate and distinct (R. 161a, 165a-66a, 179a-80a, 208a, 211a); news is broken down by employees of AP into classifications appropriate to the three circuits (R. 185a-87a, 216a, 238a-39a, 258a-60a, 261a, 269a; D. Ex. 42; R. 244a, 501a-02a); the three circuits are controlled separately, connect different cities and are operated at different hours (R. 161a, 183a, 208a-11a; D. Ex. 32a-34a; R. 220a, 462a-66a). The classification of news for each of the three circuits is recognizable and distinguishable (Par. 13 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a-23a; R. 114a, 185a-87a, 205a, 216a, 238a-39a, 258a-61a, 265a, 269a-70a, 284a-85a; D. Ex. 42; R. 244a, 501a-02a). Certain specialized news of AP is further broken down and classified into sports dispatches, tabular stock market quotations, other regional dispatches, wire photo service, features, etc. which do not comprise part of AP's basic "leased wire news service" (Par. 17 of Stipulation, P. Ex. 7; R. 92a, 418a at 423a-24a). This specialized news is furnished over separate facilities as supplemental or optional news services and each may be purchased for an additional charge and received only by a member who receives the basic leased wire news services of AP (R. 154a-56a).

In 1957 Times-Star was publishing its newspaper at a loss. In an attempt to reduce its losses, on September 10, 1957, Times-Star asked AP to furnish it only the Ohio Big Cities news wire and to discontinue the other three news wires in AP's package. AP refused its request because of its long-established policy of requiring all members to receive and pay for a "package" of wire services (R. 109a-10a, 280a, 285a, 288a). As the Court of Appeals stated "appellant [Times-Star] found the Ohio Big Cities wire to be so desirable and indispensable to its requirements that, when AP refused to furnish it except when 'tied-to' three other wires, appellant [Times-Star] continued to subscribe to and pay for all four wires, although it desired only the Ohio regional service and was experiencing a recurring operating deficit" (App. A, Petition at 30a).

When Times-Star ceased publishing its newspaper on July 19, 1958 and sold some of its newspaper assets to Scripps, no back assessments were owing (Par. 18 of Stipulation, P. Ex. 92a; 418a at 424a). Scripps requested AP to furnish it only the "A" trunk circuit but AP refused to do so. AP advised Scripps that it was the established practice of AP not to sell separately the three news wires comprising its basic news services to a metropolitan newspaper in Ohio and that any one of the three news wires must be taken, if at all, with the other two news wires as a unit and paid for as a unit (R. 236a-40a). The Kentucky State wire was arbitrarily dropped in the proposal made to Scripps (R. 240a-41a) after having been included in the package initially proposed by AP (D. Ex. 42; R. 244a, 501a-02a).

AP sued Times-Star in the District Court for the Southern District of Ohio for two years' wire service charges or assessments, claiming breach of contract because of Times-Star's failure to give AP two years' advance notice of its termination of the "package" of news services. AP invoked

federal diversity jurisdiction under Title 28 United States Code Section 1332. Times-Star's Amended Answer raised the issue, among others, that under the antitrust laws AP's long-standing practice of tying each of its three basic wire services to a package invalidated the contract between the parties. Times-Star also filed a counterclaim under Title 15 United States Code, Sections 1 and 15 seeking to recover damages from AP because it had refused to sell Times-Star only one of its basic news wire services in September 1957 without the other three, in keeping with its unlawful tying practice.

The District Court (Judge Frank J. Battisti sitting without a jury) denied the defense of AP's unlawful tying practice and dismissed Times-Star's counterclaim, for the reason that Times-Star had failed to show that there was "a natural division in the cost of gathering news transmitted" over the three basic wire services. Judge Battisti held that unless "such a complete division" of cost could be shown it would be "unnecessary and futile to explore the other elements of the alleged tying agreement" (App. B, Petition at 66a-67a).

On the basis of this Court's holding in *Associated Press* v. *United States*, 326 U.S. 1, 7 (1945), the Court of Appeals recognized that "AP cannot escape the consequences [of the Sherman Act] on the theory that it is a mutual and cooperative association, distributes news only among its own members, pays no dividends, defrays its expenses through assessments, and does not 'sell' news for a 'price'" (App. A, Petition at 9a). The Court of Appeals had "no doubt that a division could be made by AP for a separate charge for its Ohio Big Cities wire" (App. A, Petition at 25a). Then that Court limited its holding on the issue of separability solely to the Ohio Big Cities wire (App. A, Petition at 25a). It found that the Ohio Big Cities wire was a product "separable and distinct" from the other

wires included in the package of services furnished to Times-Star (App. A, Petition at 26a). Moreover, the Court of Appeals stated that "the record clearly establishes that AP required appellant [Times-Star] to continue to subscribe and pay for three wires which appellant [Times-Star] did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant [Times-Star] to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services" (App. A, Petition at 18a).

The Court of Appeals also found that the other essential elements of an antitrust violation were established. Specifically, the Court found that Times-Star satisfied the requirement of showing that AP had "sufficient economic power" because of *the uniqueness of AP's news dispatches and the desirability of the tied product* (App. A, Petition at 28a-30a). Also, the Court found from the evidence in the case that "a not insubstantial amount of commerce is affected" by the illegal tie-in arrangement of AP (App. A, Petition at 30a-31a).

Having found a clear violation of Section 1 of the Sherman Act, the Court of Appeals would not enforce the contract by requiring Times-Star to pay for two years of wire services it never received and thereby enforce ". . . the precise conduct made unlawful by the [Sherman] Act" *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), at 520. Even though the Court found that Times-Star had suffered injury, it dismissed Times-Star's counterclaim because "the evidence of damages is too speculative to support the counterclaim" (App. A, Petition at 34a).

There is now pending before this Court a Petition for Writ of Certiorari (No. 185) filed by Times-Star presenting only the question "where both an illegal tying arrangement under the Sherman Act and injury to the buyer have been established, what is the measure of proof required by

the buyer to prove the extent of his injury when the seller has no separate prices and maintains no separate cost records for the tied services?" In that Petition Times-Star did not ask this Court to review any of the questions raised in the instant Petition because such questions have already been settled by decisions of this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Decision of the Court of Appeals is Not in Conflict With the Decisions of This Court in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), or *Automatic Radio Co.* v. *Hazeltine*, 339 U.S. 827 (1950), or *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) or with the Decision of the Court of Appeals for the Tenth Circuit in *McCullough Tool Company* v. *Well Surveys, Inc.*, 343 F.2d 381 (1965).

The Court of Appeals found that AP "required" metropolitan newspaper members, including Times-Star, to receive and pay for a package of "separable and distinct" news wires (App. A, Petition at 10a, 17a, 18a, 26a). It did not find that AP merely "offered" its package of news wires to metropolitan newspaper members. This Court pointed out the significance of the distinction in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), at 159:

> "We do not suggest that films may not be sold in blocks or groups, *when there is no requirement, express or implied, for the purchase of more than one film.*" (Emphasis added)

The requirement of AP found by the Court of Appeals in the instant case had existed ever since 1935 (App. A, Petition at 7a, 10a). As the Fourth Circuit stated, the "gravamen" of illegality in tying arrangements "is the

forbidden condition, agreement, or understanding . . . whether this is voluntary or is imposed by coercion." *McElhenney* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959). Accordingly, the contract in the instant case was unenforceable because of AP's requirement for the purchase of its package of news wires.

The cases of *Automatic Radio Co.* v. *Hazeltine*, 339 U.S. 827 (1950), *McCullough Tool Company* v. *Well Surveys, Inc.*, 343 F.2d 381 (10th Cir. 1965), and *United States* v. *Loew's, Inc.*, 189 F. Supp. 373 (S.D. N.Y. 1960), *aff'd.*, 371 U.S. 38, cited by AP (Petition at 14-16) as in conflict with the decision of the Court of Appeals in this case, also are clearly distinguishable and are not in conflict.

In *Automatic Radio Co.* and *McCullough Tool Company* there was no *requirement* that the licensee accept a package of patents. AP (Petition at 15) quotes only the underscored words from a portion of this Court's opinion in *Automatic Radio Co.*:

> ". . . there is no conditioning of the license grant upon the acceptance of another and different license. We are aware that petitioner asserted in its countermotion for summary judgment in the District Court that *Hazeltine refused to grant a license under any one or more of its patents to anyone who refused to take a license under all.* This averment was elaborated in the affidavit of petitioner's attorney in support of the motion. The point was not pressed in the Court of Appeals or here. In any event there is nothing available in the record to support the averment. . . ." 339 U.S. at 831.

In *McCullough Tool Company* the Tenth Circuit referred to this Court's decision in *Automatic Radio Co.* and then pointed out:

> "There is no such showing of coercion in this case. In fact the trial court specifically found: 'After June 1,

> 1956, WSI has been willing to grant licenses on its patents individually or collectively upon negotiated reasonable terms . . .'." 343 F.2d at 408.

AP (Petition at 16) also misses the point of Judge Dawson's ruling in *Loew's* that the "Big 50" films, a block of films, were not "block booked" with Storer Television Stations. The basis of the ruling was NTA's "categorical denial", not contradicted by Mr. Storer, that it required Storer to accept films in blocks (189 F. Supp. at 394). The Court certainly was not ruling that at the time the contract was executed a specific demand for less than the block of films was a prerequisite to illegality in tying cases since it had disposed of that question earlier in its opinion when it stated:

> "The Court does not believe that a specific 'demand' is a necessary prerequisite of a finding of refusal if there is sufficient other evidence to justify a finding that there was a refusal on the part of the distributor to deal except on a block-booked basis." 189 F. Supp. at 381.

AP's Petition totally ignores the Court of Appeals' finding that the contract executed by the parties in 1948 was of a *continuing nature* (App. A, Petition at 10a, 18a, 20a, 30a, 53a). The Court below certainly did not find that the parties' continuing performance under the contract constituted "an intelligible economic transaction in itself", as AP contends it should be characterized (AP Petition at 19). Such a holding would mean that Times-Star was required forever to receive and pay for AP's *unwanted and unneeded* "A", "D", and Kentucky State wires in order to continue to receive AP's *indispensable* Ohio Big Cities wire because Times-Star did not request less than the package in 1948 (App. A, Petition at 18a, 30a). Indeed, AP provided no means by which Times-Star could discontinue

receiving and paying for separable, unwanted, unneeded, and expensive news wires. As the Court of Appeals stated, "This is one of the situations which is 'an object of anti-trust concern' *United States* v. *Loew's, Inc.*, 371 U.S. at 45" (App. A, Petition at 18a).

In attempting to lure this Court's attention to the circumstances surrounding the execution of the contract in 1948, AP also totally ignores the Court of Appeals' finding that AP's illegal tying arrangement was not embodied in the contract but established from AP's course of conduct:

> "It is true that no tying arrangement is spelled out expressly in the contract between the parties upon which AP based this action, or in the AP By-Laws. The result is accomplished by the By-Law provision that the nature and extent of the news service to be furnished a member shall be determined by the Board of Directors.
>
> "A tying arrangement or condition 'need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct.' *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 837 (C.A. 4), cert. denied, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed. 2d 1255. The tying arrangements found unlawful in *United States* v. *Loew's, Inc.*, *supra*, and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, were not spelled out in contracts" (App. A, Petition at 22a-23a).

Similarly, *McElhenney* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959), and *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. den.* 377 U.S. 993, hold that illegal tying arrangements need not be embodied in written contracts but may be established by a course of conduct.

The Court of Appeals held that AP's *conduct*, not its *contracts*, requiring Times-Star and other metropolitan

newspaper members to receive and pay for a package of news wires violated the antitrust laws. The significance of the distinction is that the circumstances surrounding AP's imposition of the *requirement* in this case, not those leading to the contract of 1948, show that AP exercised coercion. The requirement was coercion, which had its *impact* on Times-Star in 1957 when AP refused to furnish Times-Star only the Ohio Big Cities wire (App. A, Petition at 6a-9a). In both *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), and *Northern Pacific Railroad Co.* v. *United States*, 356 U. S. 1 (1958), this Court spelled out how sellers exercise coercion in employing illegal tying arrangements:

> "*By conditioning his sale of one commodity on the purchase of another*, a seller *coerces* the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." (Emphasis added; 345 U.S. at 605 and 356 U.S. at 10.)

The Court of Appeals held it was no defense for AP to contend that Times-Star was bound by its contract for another two years to take the AP's package of news wires (App. A, Petition at 10a). It stated that if AP's "practice" violates Section 1 of the Sherman Act, it is "axiomatic" that the contract "is 'illegal' under the express terms of the statute" (App. A, Petition at 10a). The Court quoted from this Court's opinion in the *Loew's* case as follows:

> ". . . [t]he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives." (371 U.S. at 51; App. A, Petition at 10a.)

More recently, this Court struck down an agreement in violation of the antitrust laws although the parties entered into it voluntarily. In *Simpson* v. *Union Oil Co.* 377 U.S. 13 (1964), this Court pointed out:

> "The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in the Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." 377 U.S. at 18.

II. The Court of Appeals Properly Refused to Enforce the Unlawful Contract.

One of the most distinguishing facts in this case is that no back assessments are involved. Times-Star paid in full for all news dispatches it received before it stopped publication. It has already paid for news services of AP that it did not want or need. Therefore, this is not an action to recover for goods sold and delivered, or to require a party to pay for benefits received by him. AP seeks to require Times-Star to pay for two years of news wire services it never received. Accordingly, the decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1958) where title to the property under the contract passed to the purchaser, is not in point.

In *Kelly* the petitioner purchased fifty cars of onions from the respondent. All of the onions were placed in storage for the benefit of the petitioner. After the sale the petitioner paid for thirteen cars of the onions but defaulted in the payment for the remainder. The respondent sued the petitioner for the unpaid purchase price and storage charges. The petitioner defended on the ground, among others, that the sale was made pursuant to an agreement which violated the Sherman Act in that respondent and

other onion growers agreed not to deliver any onions on the futures market.

This Court recognized that there was a "completed sale" in *Kelly* and, therefore, was guided by the overriding general policy "of preventing people from getting other people's property for nothing when they purport to be buying it." 358 U.S. at 520-21. It was the Court's position that "it can hardly be said to enforce a violation of the [Sherman] Act to give legal effect to a completed sale of onions at a fair price." 358 U.S. at 521. So the Court rejected the Sherman Act defense which was clearly based on circumstances collateral to the contract, and permitted the respondent-seller to recover. However, the Court reiterated the fundamental principle that it will not enforce a contract violative of the antitrust laws when "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." 358 U.S. at 520. See *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899), in which this Court long ago held that "the authorities . . . unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. . . ."

Unlike the *Kelly* case, the Court of Appeals found in the instant case that "the Sherman Act is interposed as a defense, not to defeat an obligation for services received, but to avoid paying weekly assessments for two years after appellant [Times-Star] had ceased publication of *Times-Star* and had sold its newspaper" (App. A, Petition at 33a). Cf. *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *rev'd. on other grounds*, 365 U.S. 320 (1961) which concerned the enforceability of an executory contract found by the Sixth Circuit to be illegal under the Clayton Act; therefore, enforcement was denied *in futuro*. Unlike the *Kelly* case, here the contract was illegal under the Sherman Act because of AP's longstanding *requirement* of a package purchase; therefore, the Court of

Appeals would not require Times-Star to pay for two years of news wire services it never received, and thereby enforce "the precise conduct made unlawful by the [Sherman] Act." 358 U.S. at 520.

III. The Decision of the Court of Appeals on the Factual Issue of Separability is Not in Conflict With the Decision of this Court in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953) or the Decision of the First Circuit in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653 (1961), *cert. den.*, 368 U.S. 931.

Neither *Times-Picayune* nor *Dehydrating Process* was of any help to the Court below in resolving the narrow factual issue of separability. Both cases are clearly distinguishable. As to the force of *Times-Picayune* as a precedent, the Sixth Circuit noted, as this Court did in *Northern Pacific Railroad Co.* v. *United States*, 356 U.S. 1, 10 (1958), that "the *Times-Picayune* case has been limited to the exact state of facts before the court" (App. A, Petition at 14a). Moreover, the Sixth Circuit observed that the rationale of *Times-Picayune* was weakened by the subsequent decision of this Court in *Northern Pacific* (App. A, Petition at 13a). In commenting on *Dehydrating Process*, the Sixth Circuit recognized that the decision did not really turn on the question of separability. This is evidenced by the fact that the First Circuit based its decision on "sound business reasons" and, as stated by the Sixth Circuit, such a decision "would seem to presuppose there are two separate products" (App. A, Petition at 16a).

In resolving the factual issue of separability the Sixth Circuit relied primarily on two cases which set forth useful tests of criteria of separability, *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd.*, 365 U.S. 567 (1961), and *United States* v. *Loew's, Inc.*, 189

F. Supp. 373 (S.D. N.Y. 1960), *aff'd.*, 371 U.S. 38 (1962). Transposing these criteria of separability to the facts in the instant case, the Court of Appeals properly found:

> "1. AP's competitor, UPI, offered everything necessary for a complete news service, but did not charge for its basic wires in a single package as did AP;
>
> "2. The number of news dispatches of AP and other news services vary considerably and are used by newspapers as space and interest warrant. Hardly any two versions are the same;
>
> "3. UPI charges separately for its news wires, as does AP for the Kentucky wire (at least in its proposal to Scripps), the sports wire, and various supplemental wires;
>
> "4. Finally, AP offered certain wires on an optional basis, but required appellant to subscribe for the 'A' wire, 'D' wire and Kentucky wire on a 'package' basis in order to receive the Ohio Big Cities wire" (App. A, Petition at 22a).

In the *Loew's* case, the defendants argued before the District Court that the block-booked feature films were really all alike and therefore not separate. In our case the AP argues "news is news" and therefore inseparable (Petition at 21). Judge Dawson acknowledged in *Loew's* that, true films are films ("news is news"), "but they vary in theme, in artistic performance, in stars, in audience appeal, etc." As he also said, "Each film was unique in its subject matter and presentation" 189 F. Supp. at 381. Here AP's news dispatches are also not only unique but they possess a uniqueness "to suggest comparison with a monopoly by patent", as stated by the Court of Appeals (App. A, Petition at 29a). Judge Dawson continued:

> "In order to be a 'tie-in' there must, of course, be two distinct products, but grades of feature films

> might constitute different products. To say that a television station may not license 'Gone With The Wind' unless, at the same time it licenses 'Getting Gertie's Garter' is just as much a tie-in of disparate products as to say a buyer may not purchase a certain salt machine unless he also buys a particular brand of salt." 189 F. Supp. at 381.

In the more recent case of *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848 (S.D. N.Y. 1963), cited with approval by the Sixth Circuit (App. A, Petition at 14a-15a), the defendant argued there was only one product involved: the sponsorship of a television program, citing *Times-Picayune*. The Court disagreed, holding "35 undesirable stations are not the same as 95 desirable stations. Nor are 35 additional stations the same product as the sponsorship of a unique program". It follows that three or even two "undesirable" news wires are not the same as one "desirable" news wire. Nor are four news wires the same product as a news report which may come over many wires and which may not be desired by a newspaper over all wires.

The Court of Appeals correctly found from all the evidence in the case "that the Ohio Big Cities wire was a product separate and distinct from the other AP wire services just as were motion picture films in *United States* v. *Loew's, Inc.*, *supra*, the television program in *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, *supra*, and the community television antenna equipment in *United States* v. *Jerrold Electronics Corp.*, *supra*." (App. A, Petition at 26a).

AP completely overlooks the many facts set forth herein (supra pages 3-5) which were carefully considered and relied upon by the Sixth Circuit in resolving the issue of separability (App. A, Petition at 11a-26a). On the other

hand, in an attempt to magnify this narrow factual issue into one warranting review by this Court, AP argues that enforcement of the restriction as to the tie-in of its news services will be very disadvantageous to it and its members and greatly impair its ability to operate efficiently. This is precisely the same argument asserted by Columbia Pictures in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) and rejected when this Court made it clear that:

> ". . . the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes a policy of the anti-trust laws receive judicial sanction." 334 U.S. at 159.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by AP should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 185

TAFT-INGALLS CORPORATION,
Petitioner,

v.

THE ASSOCIATED PRESS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent in No. 185, The Associated Press ("AP"), has also filed a petition for a writ of certiorari, No. 183, October Term, 1965, seeking review of the same judgment of the United States Court of Appeals for the Sixth Circuit which petitioner here seeks to have reviewed, to the extent that such judgment decided that AP's relationship with Taft-Ingalls Corporation (hereinafter sometimes called "Times-Star") constituted an illegal tie-in in violation of the antitrust laws, and dismissed AP's complaint.

If the petition in No. 183 is granted and the judgment below thereafter reversed by this Court, the issue raised by this petition need not be reached.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 340 F. 2d 753, and is appended to the petition in No. 185 as Appendix A, and to AP's petition in No. 183 as Appendix A. The opinion of the United States District Court is unreported, but is appended to AP's petition in No. 183 as Appendix B. It is also printed at pages 23a-32a of the Appendix for Defendant-Appellant (Times-Star) filed in the Court of Appeals (Volume III of the Certified Record).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

It is respectfully submitted that no question such as that presented by the petition in No. 185 is properly raised by the decision of the court below. As we show hereinafter, the only damage questions which might be said to arise, and we do not believe they are appropriate for this Court's review, are (1) whether, on the record, Times-Star has shown the fact of damage or injury, and, if so, (2) whether, on the record, Times-Star has submitted any relevant data which would permit the trier of fact to make a reasonable estimate of the extent of Times-Star's damages without relying on speculation or guesswork.

STATUTES INVOLVED

The statutes involved are referred to in the petition (p. 2).

STATEMENT

The facts underlying this litigation are set forth at pages 3-14 of AP's petition in No. 183. They plainly show, we submit, that the majority of the Court of Appeals below erred in sustaining Times-Star's antitrust tie-in defense to AP's complaint because, among other things, (a) Times-Star, when it agreed in August 1948 to take AP's basic news service, wanted exactly what it obtained, (b) Times-Star could not later change its mind and, on a plea that AP's method of operation amounted to an illegal tie-in, commit with impunity a breach of its contract with AP—a contract perfectly valid when made, and (c) AP's basic news service, though transmitted over three wires, was a single, inseparable service with respect to which an illegal tie-in could not exist.

On the question of liability on the complaint, the four judges below who heard the case split two to two. The District Court Judge (Hon. Frank J. Battisti), and Judge O'Sullivan of the Court of Appeals found that AP had not violated the antitrust laws. Judges Phillips and Edwards, of the Court of Appeals, found to the contrary. In contrast, all four judges unanimously held that Times-Star's counterclaim, seeking damages for the alleged violation, must be dismissed (Appendix A to Petition in No. 185, pp. 32a, 53a; Appendix B to Petition in No. 183, p. 69a).

Unless, of course, the majority of the Court of Appeals properly held that an illegal tie-in existed, the question of whether Times-Star sufficiently proved damages on its counterclaim does not arise. In what follows we assume, *arguendo*, that an antitrust violation occurred, although in fact, as shown by the petition in No. 183, we vigorously deny that such is the case. Our objective here is to demonstrate not only that there is no important question presented by

this petition for this Court's consideration, and no conflict between the decision below and those of this Court or other Courts of Appeals, but also that Times-Star (a) has presented no relevant data permitting a reasonable estimate of the extent of damages on any basis, and (b) has not even presented evidence showing that Times-Star was in fact injured.

ARGUMENT

Since *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562, it has been clear that the fact of damage, or injury, arising from an antitrust violation must be proved with certainty. And, at least since *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264, it has been apparent that while a jury, or other finder of the facts, "may not render a verdict [as to the extent of damages] based on speculation or guesswork", it "may make a just and reasonable estimate of the damages based on relevant data. . . ."

In this case, there is no doubt that the court below applied the proper standards of damage proof. The only conceivable question is whether the record supports the Court of Appeals' rulings on the issue of Times-Star's damages.

AP is a membership corporation organized to gather and distribute to, and exchange with, its members news and information of all kinds (R. 61a; P. Ex. 6, R. 395a-397a, 24b).* No applicant can be admitted to AP membership without giving his "assent to be bound by the By-Laws. . . ." (P. Ex. 6, R. 401a, 24b). Nor can he be admitted to membership unless he has entered into a contract with AP providing that AP "shall furnish and the member

*The citation "R. a" refers to pages in the Appendix for Defendant-Appellant (Petitioner) in the Court of Appeals (Volume III of the Certified Record); the citation "R. b" refers to pages in the Appendix for Plaintiff-Appellee (Respondent) in the Court of Appeals (Volume IV of the Certified Record).

shall receive and use a regular news service" of AP (R. 401a, 411a). The "nature and extent" of the news service to be furnished a member, and the assessment to be levied, is determined by AP's Board of Directors. Both may be changed from time to time by the Board (R. 410a-411a). Membership in AP "shall cease upon the expiration or termination of his or its contract to which such membership relates" (R. 403a).

AP's basic news service has consisted of national, international, business, financial, regional and local news which, since 1935, has been transmitted to metropolitan newspaper members east of Kansas City and north of the Mason-Dixon line over three so-called wires, the A and D wires, and a regional wire known in Ohio as the S or Ohio Big Cities wire (see Petition, No. 183, pp. 5-6; P. Ex. 7, R. 421a-422a, 92a; R. 81a-82a, 179a, 214a, 215a). AP's costs of operation in furnishing the basic news service have, since 1915, been financed under a formula approved by the Board of Directors for assessing each of its members on the basis of the population served by such member (R. 65a-66a, 80a, 195a, 89b, 118b; D. Ex. 35, R. 467a-468a; 324a).

Thus, under the By-laws, a newspaper, by becoming and remaining a regular member of AP, necessarily consents to at least three things: (1) it will receive the basic news service, (2) it will pay an assessment based, not on AP's cost of furnishing the service to it, but on the population of the area it serves, and (3) it will furnish to AP, for exchange with other members, all spontaneous news originating in its area (P. Ex. 6, R. 401a, 410a-411a, 24b; P. Ex. 4, R. 390a, 65a).

The majority of the Court of Appeals below, in holding that the regional or S wire was severable from the A and D wires, necessarily implies that, at least upon proper

request, AP is required to supply Times-Star, or any other Ohio metropolitan newspaper, with the S wire alone. A newspaper which would receive the S wire only, however, could not become or remain a member of AP. This is so because (a) such newspaper does not consent to receive AP's basic service, and (b) it does not agree to pay an assessment calculated on the same basis as that agreed to by the other members.

If, therefore, a newspaper such as Times-Star were to be furnished with news transmitted over the S wire alone, some basis of payment other than an assessment based upon the population of the Cincinnati area would have to be devised. Obviously, AP should be entitled to charge, as a bare minimum, its cost of furnishing to Times-Star the S wire alone.

By the same token, where, as here, AP did not comply with Times-Star's tardy request, nine years after it signed its contract, for the S wire alone, Times-Star's measure of damages, if any, would appear to be at most the difference (again, if any) between AP's cost of furnishing the single wire to Times-Star and the amount of the assessment paid by Times-Star from the time it requested the single wire to the date when it sold its assets to the competing Scripps newspaper.

Such a measure of damages would be consistent with the tie-in cases on which Times-Star itself relies in an attempt to create a conflict (Petition, p. 11). Thus, in *Lessig* v. *Tidewater Oil Company*, 9 Cir., 327 F. 2d 459, 471-2 (1964), *cert. den.*, 377 U. S. 993; *Osborn* v. *Sinclair Refining Company*, 4 Cir., 324 F. 2d 566, 570 (1963); and *Bascom Launder Corp.* v. *Telecoin Corp.*, 2 Cir., 204 F. 2d 331, 334 (1953), *cert. den.*, 345 U. S. 994, the courts either held or suggested that in illegal tie-in cases, plaintiff's damages might include the additional amounts he had to

pay because of the tied-in purchases he was compelled to make.

Times-Star apparently intended to offer some such proof. It retained Mr. R. Kirk Batzer, of the accounting firm of Lybrand, Ross Bros. & Montgomery, to make a study of the damage question (D. Ex. 54, R. 525a, 337a). It is on Batzer's reports, together with his direct examination and cross-examination, that the validity of Times-Star's damage proof depends (D. Ex. 35, R. 467a, 324a; D. Ex. 54, R. 525a, 337a; D. Ex. 55, R. 541a, 337a; R. 315a-344a, 117b-140b; Petition, No. 185, pp. 5-6).

Batzer reported that his investigation was "for the purpose of ascertaining information as to costs incurred by The Associated Press in respect of each of certain wire facilities which it furnished to The Cincinnati Times-Star. . . ." (R. 525a).* Mr. Batzer's conclusions, however, bore no relation to AP's cost of furnishing the S wire alone to Times-Star. Mr. Batzer, on cross-examination, conceded as much (R. 125b). This fundamental error in the Batzer theory renders his reports useless as a measure of damages.

Initially, Mr. Batzer endeavored to isolate the total operating costs of AP, including allocations of overhead, applicable to the basic news service (D. Ex. 54, R. 527a-531a, 337a). For purposes of argument, we will assume that this was properly done. Batzer further assumed, and we do not quarrel with the assumption, that the total assessments paid by all members receiving the basic service are designed roughly to equal, in the long run, these operating costs (R. 525a). Batzer's fundamental error was in leaping from these assumptions to the erroneous conclusion, without support in the record and on a matter as to which he was concededly not an expert (R. 130b), that the assess-

*That is to say, AP's cost of gathering and distributing news over the A wire, over the D wire, and over the S wire to a *single newspaper,* Times-Star.

ment charged to a single newspaper, Times-Star, "may also represent the appraisal by The Associated Press of its cost of furnishing such service" (D. Ex. 54, R. 526a, 337a).

Batzer, by sampling the volume of lineage coming to Times-Star over each of the three wires (A, D and S) during the period of a week, obtained percentages representing the proportion of the total lines transmitted by the basic service which went over each of the wires during the sample period. He applied these percentages to Times-Star's assessment for the basic service of $1,317.45 weekly, to obtain what he calls the "cost of the separate wire services" to Times-Star (D. Ex. 54, R. 534a, 337a; D. Ex. 55, R. 542a, 337a). Even if we assume, for the time being, that Batzer's calculations give him roughly what Times-Star had been paying under its assessment, for each of the three wires, the figures bear no relation to the only figure relevant to a proper measure of damage, namely, AP's cost of furnishing the S wire alone to Times-Star.* Batzer, on cross-examination, conceded that this was so (R. 125b, 127b-128b, 139b-140b).** Indeed, in his basic report Batzer con-

*Batzer's basic report (D. Ex. 54, R. 525a-534a, 337a), as supplemented (D. Ex. 55, R. 541a-542a, 337a), goes through a tortured process of allocating total costs to costs attributable to the basic service, and allocating these costs between costs of gathering news and costs of distributing news, before he applies his lineage percentages. This does not disguise the fact that essentially all Batzer is doing is applying the lineage percentages to Times-Star's weekly assessment based on population. Thus, 56.14% of all lines of copy, attributed by Batzer to the A wire, multiplied by Times-Star's weekly assessment for the A, D and S wires, $1,317.45, equals $739.62. 14.60% for the D wire times $1,317.45, is $192.35. 29.26% for the S wire times $1,317.45 is $385.48. Compare these with Batzer's final figures: A wire—$756.38; D wire—$187.23; S wire—$373.84 (D. Ex. 55, R. 542a, 337a). In other words, Batzer could have arrived at the same irrelevant result without considering AP's costs at all.

**When Mr. Batzer was specifically asked whether his final figure for the S wire was "the cost of providing that news" alone to Times-Star, he replied, "In answer to your question, sir, you have posed a different set of facts. You have posed only one wire would be furnished. I don't know what other attendant circumstances there were. I cannot say, this would be the cost under the circumstances which you described" (R. 125b).

fessed that ". . . we feel that neither the charges or so-called elements themselves which make up the basic assessment nor any particular analysis thereof can be used to determine the separate wire cost" (D. Ex. 54, R. 526a-527a, 337a). This was confirmed at the trial by Times-Star's counsel, who stated "The [Batzer] report is essentially . . . an attempt to allocate the assessment. . . . It is not an attempt to show the cost going into the formula . . ." (R. 140b).

That Times-Star's assessment bears no relation to AP's cost of furnishing the basic three-wire service to Times-Star is dramatically disclosed by certain schedules to one of Batzer's reports (D. Ex. 35, R. 483a-485a, 324a). Schedule II (D. Ex. 35, R. 483a) may be taken as an example. Schedule II shows the allocation of the so-called First General Charge, one of the elements of AP's assessment formula, among various Ohio cities. The population of the Cincinnati area based on the 1950 census, with adjustments not material here, is listed at 863,000. Based on this population Cincinnati newspapers in the evening field were assessed, under the First General Charge, the weekly sum of $365.10.*

In contrast, evening field newspaper members in Cleveland were assessed $556.30 under the First General Charge, almost $200.00 more than Cincinnati, because Cleveland's population was 1,315,000, considerably more than Cincinnati's. Yet, Cleveland newspapers received the identical basic service supplied to Cincinnati newspapers (R. 156a-157a), and AP's cost, whatever it might be, of furnishing

*If there had been more than one Cincinnati AP member newspaper in the evening field, they would have shared in paying this assessment. Since Times-Star at the time was the only Cincinnati AP member in the evening field, it was assessed the entire sum (D. Ex. 35, R. 471a-472a, 324a). This fact alone shows that the amount of assessment paid by an individual newspaper has no relation to costs.

the basic service to Cleveland newspapers obviously must be about the same as its cost of furnishing the same service to Cincinnati newspapers.

An additional illustration demonstrating that Times-Star's assessment bears no relation to the cost of furnishing the service is the fact that a newspaper in a city and state west of Kansas City, having a population equal to Cincinnati, Ohio, would pay the same assessment as Times-Star, even though the D wire does not run west of Kansas City (R. 89b-90b).

Plainly, therefore, Batzer is not ascertaining AP's costs of supplying Times-Star when, for example, he suggests that since 41.83% of AP's total costs allocable to the basic service relate to distribution costs (as distinguished from gathering costs), 41.83% of Times-Star's weekly assessment of $1,317.45 is attributable to the cost of distributing the basic service to Times-Star (D. Ex. 54, R. 530a, 337a; D. Ex. 55, R. 542a, 337a). Nor is Batzer ascertaining costs when, for example, he suggests that since 29.26% of the copy transmitted to Times-Star over the three-wire basic service was sent over the S wire, therefore, 29.26% of AP's cost of distribution to Times-Star is attributable to the S wire (R. 532a, 542a).* One cannot, by applying a percentage to oranges, obtain lemons. Nor can one, by applying a percentage to an assessment based on population, obtain costs.

Since Times-Star, concededly, has not presented any relevant data as to AP's cost of supplying the S wire alone to Times-Star, there is no guide for determining or even estimating the difference between such cost and the assessments paid by Times-Star during the relevant damage

*The portions of Batzer's report dealing with news gathering costs are subject to the same infirmity as those dealing with news distribution costs (D. Ex. 54, R. 530a, 532a-534a, 337a; D. Ex. 55, R. 542a, 337a).

period. The Court of Appeals, therefore, correctly held that the counterclaim was properly dismissed because the evidence of damages was too speculative (Appendix A to Petition in No. 185, p. 32a, 53a). Its decision in this respect is perfectly consistent with prior decisions of this Court and of other Courts of Appeals, including the cases relied on by Times-Star.

Moreover, for all that appears in the record, AP's cost of furnishing the S wire alone to Times-Star could well have equalled or exceeded the entire assessment paid by Times-Star. Since Times-Star, which has the burden of proof, has concededly shown nothing concerning the cost of the S wire (R. 125b, 127b-128b), it has not demonstrated anything to the contrary, and there is a failure to prove the fact of damage or injury. For this reason we submit that the finding of the majority of the Court of Appeals that the granting of Times-Star's request in September 1957 for the S service only "would have effected a substantial reduction in appellant's [Times-Star's] operating costs" is erroneous and unsupported by anything in the record if, by the finding, the majority meant to imply anything more than the obvious conclusion that if AP agreed to supply only the S wire at a reduction in assessment a saving to Times-Star would have resulted (Appendix A to Petition, No. 185, pp. 6a-7a; R. 108a-109a). We doubt that it did.

Batzer's failure to arrive at anything remotely resembling AP's costs of furnishing the respective wires to Times-Star is, of itself, sufficient to sustain the dismissal of Times-Star's counterclaim. Apart from this basic defect, moreover, it should be noted that Mr. Batzer is an accountant who is not, and was not qualified as, an expert in the field of news gathering and distribution. No one testified that Mr. Batzer's calculations constituted a reasonable

method of apportioning AP's costs among the three wires supplied to Times-Star, or even that they were a reasonable method of apportioning Times-Star's assessment. Batzer himself, on cross-examination, would only go so far as to say that he "would hope" that his study might be useful in determining costs (R. 123b-124b).

Another infirmity in the Batzer study is the artificiality of percentages based on the number of lines of copy coming to Times-Star over each of the three wires constituting the basic service. To arrive at the percentages, Batzer counted the number of lines of copy transmitted over each of the wires on seven days picked at random in 1959 and 1960 (D. Ex. 54, R. 531a-532a, 540a, 337a).* No one, other than Mr. Batzer himself, who was not an expert, testified that total costs could reasonably be segregated among the three wires on any such basis (see R. 531a).

Common experience indicates that the cost of a particular news story cannot be ascertained by counting the lines. A ten line story, for example, may be the culmination of hours if not days of reportorial and editorial endeavor. A fifty line story, on the other hand, may be the result of only a few minutes work. Counting lines of copy, moreover, cannot reflect the days spent by newsmen on stories which never reach the wires.

Without evidence from one experienced in the trade that lineage bears any relation to cost, Mr. Batzer's percentages are valueless.

AP, in its Petition in No. 183, quoted an illuminating passage from Judge O'Sullivan's dissenting opinion on the subject of the inseparable character of news. The same passage bears repeating here, because it illustrates the in-

*Dates in 1959 and 1960 were selected because copy during the damage period (September 1957-July 1958) was not available (D. Ex. 54, R. 532a, 337a).

adequacy of Times-Star's proof of damages (Appendix to Petition, No. 185, pp. 35a-36a):

> "AP's man in Cairo gets information that a prominent Cincinnatian is killed in Cairo, Egypt, together with other Cairo news of worldwide interest; he sends this bundle of news to the AP bureau in New York, and from there it goes to the AP bureau at Columbus on the B wire; the chief there picks off the item of the death of the Cincinnatian and sends it to Cincinnati on the Ohio wire. I pose the question, when does this news become a separate and distinct commodity? At Cairo, Egypt? Or was it converted to singularity at Columbus? If so, should a charge for the service be limited to some portion of the salary of the AP man at Columbus and the cost of the electronic channel between Columbus and Cincinnati? But who then is to pay for the services of the people who gathered and sent out the news from Cairo, and who is to pay for its handling in New York and how will these costs be apportioned? How will Cincinnati be separately assessed for a part of Cairo's costs for the rare day on which an event in Egypt has some special interest in Cincinnati?"

I

The Question Presented Is of No General Importance in the Enforcement of the Antitrust Laws.

Petitioner suggests that an authoritative ruling by this Court is needed to establish the standards to be applied in measuring the extent of damages in tie-in cases (Petition, No. 185, pp. 7-9).

In the first place, this question need not be reached because Times-Star has failed even to prove the fact of damage, or injury. There is absolutely nothing in the record, as we have said, to show that AP's cost of furnishing the S wire alone to Times-Star does not equal or exceed Times-Star's entire assessment. The standard in these circumstances is clear. The fact of injury must be proven with certainty. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562.

The standard to be applied in antitrust cases for measuring the extent of damages is also settled and requires no further clarification by this Court. As Chief Justice Stone said in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.'"

Times-Star's problem is one personal to itself. It failed to remove the damage issue from the area of pure speculation. In this case, where the facts relating to damages are unique, it would be of no aid to the administration of the antitrust law, even with respect to tie-in cases, for this Court to examine the testimony and exhibits merely to satisfy itself that the Court of Appeals' finding on the damage issue found support in the record.

Times-Star's assertion (Petition, No. 185, p. 8) that tie-in practices by their nature make difficult any certain determination of the extent of damage is belied by the very cases on which it relies: *Lessig* v. *Tidewater Oil Company*, 9 Cir., 327 F.2d 459, 471-2 (1964), *cert. den.*, 377 U. S. 993; *Osborn* v. *Sinclair Refining Company*, 4 Cir., 324 F. 2d 566, 570 (1963); *Bascom Launder Corp.* v. *Telecoin Corp.*, 2 Cir., 204 F.2d 331, 334 (1953), *cert. den.*, 345 U. S. 994. In these cases, which are far more typical of the usual tie-in problem than the instant case, the courts found no difficulty in finding a method for measuring the extent of the damage. If Times-Star encounters greater difficulty here, may we suggest that fundamentally it is because Times-Star is trying to segregate costs or assessments among elements of a serviee which is by nature inseparable.

Petitioner from time to time suggests that its difficulty in ascertaining the extent of its alleged damage is caused by AP's own wrong (Petition, No. 185, pp. 5, 8). But, as was said in *Bigelow*, ". . . even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork" (327 U. S. at p. 264).

Moreover, AP's "wrong" complained of is not the typical one found in tie-in cases. Usually, a defendant by compelling a plaintiff to purchase an unwanted product has prevented plaintiff from buying a desired product which he might have acquired at a lesser price. Here, for half a century the members of AP, of whom Times-Star was one, consented to a system of exchange of the AP news service, and a system of assessment on the basis of population, which rendered unnecessary, even if it were possible, any record keeping by AP which purported to show AP's cost of furnishing a single wire. If there was a wrong, which to us seems inconceivable, it was a wrong in which Times-Star participated.

Because of its unique and peculiar nature, this is not a case which is likely to create a precedent on the issue of damages in other cases. No policy reason exists for the granting of the petition in No. 185. See Hon. Fred. M. Vinson, *Work of the Federal Courts,* 69 Sup. Ct. v, vi (1948).

II

The Decision Below on the Damage Question Is Not in Conflict with the Decisions of This Court and of Other Courts of Appeals.

Much that we have previously said demonstrates that the decision below on petitioner's damages is perfectly consistent with the cases relied upon by petitioner (Petition, No. 185, pp. 9-12). The court below applied exactly the same standard of measuring damages as that enunciated by the cases on which petitioner relies.* That, in some instances, damages were awarded, proves nothing more than that the facts were different and that the plaintiffs succeeded in proving relevant data sufficient to remove the issue from the guesswork stage.

With as much warrant as Times-Star, AP can cite cases where the courts, again applying the same standard, found that proof of the amount of damages was too speculative. *E.g., Siegfried* v. *Kansas City Star Company,* 8 Cir., 298 F. 2d 1, 7-8 (1962), *cert. den.,* 369 U. S. 819, *affirming,*

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*Petitioner cannot properly rely on *Darden* v. *Besser,* 6 Cir., 257 F. 2d 285 (1958) (Petition, No. 185, p. 10), for the additional reason that "'contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict. . . .'" Hon. John M. Harlan, *Manning the Dikes,* 13 The Record of the Association of the Bar of the City of New York (Dec., 1958), pp. 541, 552.

W. D. Mo., 193 F. Supp. 427, 434-5 (1961); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 2 Cir., 297 F. 2d 906, 909-13 (1962), *cert. den.*, 369 U. S. 865; *Riss & Company* v. *Association of American Railroads*, D. D. C., 190 F. Supp. 10, 14-18 (1960), *aff'd*, C. A. D. C., 299 F. 2d 133, 136 (1962), *cert. den.*, 370 U. S. 916; *Emich Motors Corp.* v. *General Motors Corp.*, 7 Cir., 181 F. 2d 70, 83-4 (1950), *modified on other grounds*, 340 U. S. 558. All that either side establishes is that each case turns on its own particular, and differing, facts.

Closer on its facts to the instant case than any case cited by Times-Star is *Siegfried* v. *Kansas City Star Company*, *supra*. There, one element which contributed in rendering plaintiff's proof of the quantum of lost profits speculative was the fact that plaintiff maintained a single set of books in which was recorded the combined income and disbursements of the three or four businesses which he operated. Attempted allocations were found by the court to be no more than a "guess estimate" (193 F. Supp. at p. 435).

We do not urge that *Siegfried* is controlling here on the merits, any more than that the cases on which Times-Star relies are controlling. All that we assert is that where, as here and in *Siegfried*, proper standards are applied, and the ruling on damages turns on the peculiar facts of the case, the petition for certiorari should, as in *Siegfried*, be denied.

Times-Star has not established, as a ground for granting its petition, a conflict with any decision of this Court or of another Court of Appeals.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari in No. 185 should be denied.

Respectfully submitted,

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July 22, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 183

THE ASSOCIATED PRESS,

Petitioner,

v.

TAFT-INGALLS CORPORATION, formerly known as THE CINCINNATI TIMES-STAR COMPANY, an Ohio Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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September 9, 1965

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No. 183

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Associated Press' ("AP's") Petition for a Writ of Certiorari in No. 183 establishes, among other things, that respondent ("Times-Star") willingly entered into a contract with AP in 1948 whereby it agreed to take AP's basic news service, transmitted over three wires; that there was nothing illegal about the contract; that this remains so, as between the parties to the contract, even if it be assumed, *arguendo,* that AP had an illegal policy or practice of requiring member newspapers to subscribe to the basic service; and that, in any event, the three-wire service was a single, inseparable "product".

In attempting to challenge these conclusions, Times-Star ignores much of the evidence and misinterprets or misapplies various authorities in the field of tie-in practices. Only a few of these errors, in our opinion, warrant rebuttal.

ARGUMENT

1. No Illegal Tie-in Can Exist Between a Willing "Buyer" and a Willing "Seller".

As we pointed out in the Petition (p. 15), all this Court held to be illegal in *United States* v. *Paramount Pictures,* 334 U. S. 131, 159, was a *"refusal** to license one or more copyrights unless another copyright is accepted." A "refusal" contemplates the rejection of a position taken by another,** and not, as here, a meeting of minds between a willing buyer and a willing seller.

Times-Star contends that it can willingly agree in 1948 to take AP's basic service and, nine years later, with impunity breach its contract by demanding only part of the basic service. Its contention, in the context of the *Paramount* case, on which it purports to rely (Br., p. 9), would mean that a motion picture exhibitor could, today, willingly enter into a written contract to take 50 films and, years later, in breach of his contract, with impunity inform the distributor that he wants only 10.

As between the parties to the contract, a specific demand for less than what is offered generally is required. Thus, in *United States* v. *Loew's, Incorporated,* S. D. N. Y., 189 F. Supp. 373 (1960), *aff'd on merits, remanded for further*

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*Emphasis supplied.

**Webster's Third New International Dictionary (1961), "refusal"; The Oxford English Dictionary (1933), "refusal".

consideration of decree, 371 U. S. 38, relied on by Times-Star (Br., p. 11), Judge Dawson stated (p. 380-1):

> "But, is a *demand** a prerequisite to a finding of refusal? There may be an inference that it is in certain opinions in treble-damage actions. J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp., 2 Cir., 1954, 212 F. 2d 840, 845; Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 2 Cir., 1959, 268 F. 2d 246, 251, certiorari denied 1959, 361 U. S. 885, 80 S. Ct. 156, 4 L. Ed. 2d 121; Milwaukee Towne Corp. v. Loew's Inc., 7 Cir., 1951, 190 F. 2d 561, 568, certiorari denied 1952, 342 U. S. 909, 72 S. Ct. 303, 96 L. Ed. 680. This may well be a rule of law applicable as to the allowance of damages in a private anti-trust action, but it can hardly be laid down as a rule of law in an action in which the Government is seeking an injunction. Furthermore, as Judge Washington said in the Royster case, 'Perhaps on occasion circumstances may excuse the lack of demand.' 268 F. 2d at page 251. The Court does not believe that a specific 'demand' is a necessary prerequisite of a finding of refusal if there is sufficient other evidence to justify a finding that there was a refusal on the part of the distributor to deal except on a block-booked basis."

AP's basic service was established with the unanimous approval of all members involved (R. 162a). Throughout AP's history since the addition of the D wire in 1934 or 1935, no member, other than Times-Star, has ever asked for less than the basic service (R. 163a-164a). Indeed, there is no evidence that any member ever asked for less

*Emphasis the court's.

prior to 1934. Plainly, it was the conclusion of all involved that a basically minimum service was being supplied. No circumstances appear which would warrant relaxation of the rule that, as between the parties to the contract, a specific demand for less than what is offered is required.

In any event, whether a specific demand is essential in private actions does not require a decision in this case, where the member affirmatively wanted the entire service and agreed to take it. Under these circumstances, there can be no valid claim that AP refused to furnish less than the entire package. *United States* v. *Loew's, Incorporated, supra,* at p. 394 (see Petition, p. 16).

Times-Star proves nothing to the contrary by citing *McElhenney Co.* v. *Western Auto Supply Company,* 4 Cir., 269 F. 2d 332 (1959) (Br., p. 9-10). Chief Judge Soboloff was speaking of agreements not to deal in the goods of another when he said that it makes no difference whether the agreement is "voluntary or is imposed by coercion . . ." (p. 338). Obviously so, in the case of agreements of that character. But in the case of tie-ins, the critical inquiry on which the question of legality turns, as between the parties, is whether the agreement is "voluntary or is imposed by coercion."*

Times-Star seeks to cast the 1948 contract in an unfavorable light by criticizing the two year termination clause (Br., p. 11-12). It is true that the contract provides that "it shall continue thereafter until terminated by the Member upon two years' notice . . ." (P. Ex. 4, R. 391a, 65a). The evidence shows that AP, in order to render service to its members, must enter into long-term commitments (R. 16b). For example, AP's labor contracts are of two or three

*The same comment is applicable to *Simpson* v. *Union Oil Co.,* 377 U. S. 13, involving a resale price fixing contract illegal whether entered into voluntarily or under compulsion (Br., p. 14).

years' duration (R. 16b, 67b-68b). Moreover, some of the leases for office space in various places are for many years' duration (R. 16b, 70b). Except for the trivial amount of $43 per week, AP has no expense saving on these or other items of cost by virtue of the withdrawal of a member (R. 15b-16b, 18b-20b, 22b). Therefore, the agreement, requiring a two year notice of termination, is plainly reasonable in every respect.

2. The Validity of the Contract Between the Parties Is Not Affected Even If an Illegal Tie-in Policy Be Assumed Arguendo.

In its Petition, AP relies on *Kelly* v. *Kosuga,* 358 U. S. 516, to demonstrate that a valid contract existed between Times-Star, a willing "buyer", and AP and that the validity of the contract would not be affected even if it be assumed, arguendo, that a collateral AP policy or practice illegally required metropolitan newspapers to subscribe to a basic service transmitted by means of three facilities (Petition, p. 17-19).

The true significance of *Kelly,* we respectfully submit, is that the purchaser was required to pay for onions he never received, and obviously did not want, even though part of the very contract was assumed to be illegal under the antitrust laws (Petition, p. 17-19). The rule of *Kelly* applies *a fortiori* here, where the contract itself is legal in every respect and inquiry must be made into collateral circumstances to determine whether an illegal policy or practice existed.

Times-Star emphasizes that *Kelly* reiterated the principle that the Court will not enforce "the precise conduct made unlawful by the [Sherman] Act" (Br., p. 15). But it never makes clear what "precise [unlawful] conduct" would be enforced if AP's contract with Times-Star is sustained. Plainly, we submit, the "precise conduct" is not

the 1948 agreement to supply Times-Star the service it wanted. There is nothing illegal about that. Nor is it AP's refusal in 1957 to acquiesce in Times-Star's breach of its 1948 contract. There is nothing illegal about that. Nor would enforcement of the 1948 contract require enforcement of any assumed AP practice of illegal tie-ins. If there is any such practice, and if it is illegal, which of course we deny, it is subject to injunction in an appropriate case or to an action by one who did not willingly agree to take the service.

3. AP's Basic Service Is Not Separable.

One must turn to the Petition to review the extensive evidence demonstrating that AP's basic service is inseparable (Petition, p. 3-8, 11-14, 20-22). Reference to such evidence is not to be found in Times-Star's Brief. Rather, Times-Star contents itself with sweeping generalizations such as, for example, (1) "Each of the wire circuits of AP is functionally and operationally separate and distinct"; (2) AP's leased wire news service for Times-Star "included the Kentucky State wire circuit"; (3) the three circuits "connect different cities"; and (4) the Kentucky wire was "arbitrarily dropped in the proposal made to Scripps" (Br., p. 3, 5, 6). We think the Petition is sufficient to demonstrate that these generalizations do not fully or accurately reflect the record facts.

We further submit that the so-called criteria of separability utilized in *United States* v. *Jerrold Electronics Corporation,* E. D. Pa., 187 F. Supp. 545, 559 (1960), *aff'd* 365 U. S. 567, and referred to by Times-Star on pages 16 and 17 of its Brief, were improperly applied by the majority of the Court of Appeals below to the facts of this case.

Unlike *Jerrold,* it is not clear from the evidence here that AP's competitor, UPI, furnished each of its wires

for separate prices (Petition, p. 14; Appendix A, p. 38a; D. Ex. 16, R. 453a, 120a). Moreover, as we have shown, no valid comparison can be drawn between UPI, a profit making corporation, and AP, a membership corporation (Petition, p. 14).

Unlike *Jerrold,* the issue here is not whether each news dispatch is a separate service, but whether the wires in the basic service are distinct. The variety of dispatches transmitted by each wire supports the conclusion that the basic service is inseparable (Petition, p. 6-7).

Unlike *Jerrold,* AP does not charge separately for each wire in the basic service (Petition, p. 7). Indeed, it would be difficult, if not impossible, to segregate costs among the three wires (Petition, p. 7-8, 11-12; see also AP's Brief in No. 185). Moreover, unlike the cable and antenna in *Jerrold,* AP's Kentucky wire and supplemental wires were not "sold" as part of the basic service (Petition, p. 12-13).

Times-Star suggests (Br., p. 16) that the "rationale" of *Times-Picayune* v. *United States,* 345 U. S. 594, was weakened by *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1. As the Court of Appeals below conceded, however, the portion of the *Times-Picayune* rationale which might be considered "weakened" is that relating to market dominance, and not separability (Petition, Appendix A p. 13a). Separability is always a fact issue, and we do not dispute that the decision in *Times-Picayune* was confined to the narrow record before the Court. However, we do assert that if the record facts in *Times-Picayune* establish inseparability of product, *a fortiori* the facts here establish inseparability of service (Petition, p. 21).

We fail to see what comfort Times-Star acquires by contending that the decision in *Dehydrating Process Co.* v. *A. O. Smith Corp.,* 1 Cir., 292 F. 2d 653 (1961), *cert. den.,* 368 U. S. 931, was based on "sound business reasons" rather than inseparability of product (Br., p. 16). As we

said in the Petition, sound business reasons or "substantial hardship" in the event of a severance of AP's basic service support AP's position that the decision of the Court of Appeals was in error (Petition, p. 22).

AP is a membership corportaion. The members consented to its method of gathering and distributing the news. A fair determination of the cost of any single wire in the basic service would be difficult, if not impossible. AP's method of recovering its operating expenses by assessments based on population is, on the other hand, a fair one. News of any character is constantly spilling over on each of the wires constituting the basic service. Failure of one newspaper to pay its assessment on the same basis as the other members would saddle the remaining members with an additional assessment (Petition, p. 3, 5-8, 9, 21-22). These and other factors plainly point to the conclusion that the basic service is a single, distinct product. Equally, however, they point to the conclusion that justifiable business reasons support the conclusion that the basic service may be sold as a unit, whether or not the three wires are regarded as physically distinct services.

CONCLUSION

For the reasons stated in the Petition, and above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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